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APPENDIX

IN THE

Supreme Court of the United States

OCTOBER TERM, 1969

No. 230

H. K. PORTER CO., INC.,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR DISTRICT OF COLUMBIA CIRCUIT

Chronological List of Relevant Docket Entries

IN THE
UNITED STATES COURT OF APPEALS
FOR THE
DISTRICT OF COLUMBIA CIRCUIT

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION — DANVILLE WORKS,
Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,
Respondent,

UNITED STEELWORKERS OF AMERICA,
AFL-CIO, Intervenor.

Docket No. 19,507

7-14-65 Petition to review and set aside order of the National Labor Relations Board filed by H. K. Porter Company, Inc.

8-2-65 Answer of the Board to petition for review and set aside order and cross-petition for enforcement.

8-2-65 Motion of Board to consolidate this case with No. 19,492.

8-17-65 Order consolidating this case with No. 19,-492.

3-22-66 Argued before Bazelon, Chief Judge; Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

5-19-66 Opinion per Circuit Judge Wright.

Relevant Docket Entries.

5-19-66 Separate opinion by Senior Circuit Judge Wilbur K. Miller dissenting.

5-19-66 Judgment affirming order of the Board, and that it shall be enforced. Pursuant to Rule 38(b) the respondent shall within 10 days hereof serve and file a proposed enforcement decree consistent with the opinion of this court.

5-31-66 Proposed decree.

6-28-66 Decree enforcing order of the Board. Senior Circuit Judge Wilbur K. Miller dissents.

6-29-66 Motion of the Steelworkers to intervene.

7-28-66 Per Curiam order allowing United Steelworkers of America, AFL-CIO to intervene in this case. CJ, Bazelon; Wilbur K. Miller, Sr. CJ & Wright, CJ. Senior Circuit Judge Wilbur K. Miller would deny the motion.

7-28-66 Certification from Clerk, Supreme Court, that petition for writ of certiorari was filed on July 28th (SC 392 OT 66)

10-19-66 Certified copy of order of the Supreme Court denying certiorari on October 10, 1966.

10-21-66 Certified copies of opinion and judgment filed May 19, 1966, and certified copy of enforcement decree filed June 28, 1966 issued to the National Labor Relations Board.

2-28-67 Intervenor's motion for leave to file motion to clarify decree, time having expired.

3-22-67 Per curiam order granting intervenor's motion for leave to file motion to clarify decree,

and denying motion to clarify decree. Bazelon, Chief Judge, and Wright Circuit Judge; Senior Circuit Judge Miller. Judge Miller did not participate in order.

3-22-67 Intervenor's motion to clarify decree.

3-22-67 Petitioner's objection to motion to clarify.

3-22-67 Intervenor's reply to objection to motion to clarify.

7-26-67 Petitioner's motion for leave to file motion requesting reconsideration of earlier motion to clarify.

12-8-67 Opinion Per Circuit Judge Wright.

12-8-67 Per Curiam order directing clerk to file lodged motion for reconsideration, opposition and the motion requesting oral argument; further ordered by the court that to the extent of the court's opinion issued this date the motion to clarify is granted; this case is remanded to the Board for reconsideration in light of the opinion CJ Bazelon, Wilbur K. Miller, Sr. CJ, Wright, CJ Sr. CJ Wilbur K. Miller dissents.

12-8-67 Intervenor's motion for reconsideration.

12-8-67 Intervenor's motion for oral argument.

12-8-67 Petitioner's opposition to intervenoir motion for reconsideration and for oral argument.

1-8-68 Certified copies of opinion and order filed December 8, 1967, issued to the National Labor Relations Board.

Relevant Docket Entries.

Docket No. 22,222

8-14-68 Proceedings transferred to this Court from U. S. Court of Appeals for the Fourth Circuit No. 12,607.

9-23-68 Cross application for enforcement of an order of the NLRB.

9-27-68 Per Curiam order allowing United Steelworkers to intervene.

10-15-68 Prehearing order approving stipulation as to issues and appendix. C. J. Bazelon.

10-15-68 Prehearing stipulation. Parties to operate under Rule 30(c).

4-21-69 Argued before CJ Bazelon; Miller, Sr. CJ and Wright, CJ. Court granted counsel for intervenor leave to lodge a memorandum of additional citations.

4-22-69 Per Curiam Order enforcing order of the Board CJ Bazelon, Wilbur K. Miller, SCJ, and Wright, CJ SCJ Wilbur K. Miller dissents.

5-5-69 Petitioner's motion for stay of mandate pending application for writ of certiorari.

5-27-69 Per Curiam order directing clerk to stay transmittal of the order of April 22nd for a period of 30 days from May 13th (June 12th) CJ Bazelon Miller, Sr. CJ and Wright, CJ.

5-27-69 Petitioner's motion for leave to supplement designation of record.

6-9-69 Order granting petitioner's motion to supplement designation of record.

6-9-69 Petitioner's designation of record for certification to Supreme Court.

6-10-69 Certified record prepared per designation and order of 6/9/69.

6-16-69 Notification from clerk, Supreme Court, for filing petition for certiorari on June 13th (1516, O.T. 68).

10-20-69 Certified copy of order of the Supreme Court granting certiorari on October 13th (S.C. No. 230 O.T. 69).

Charge Against Employer

UNITED STATES OF AMERICA
National Labor Relations Board

CHARGE AGAINST EMPLOYER

Where a charge is filed by a labor organization, or an individual or group acting on its behalf, a complaint based upon such charge will not be issued unless the charging party and any national or international labor organization of which it is an affiliate or constituent unit have complied with section 9(f), (g), and (h) of the National Labor Relations Act.

INSTRUCTIONS.—File an original and 4 copies of this charge with the NLRB regional director for the region in which the alleged unfair labor practice occurred or is occuring.

Case No. 5-CA-2785

Date Filed April 21, 1964

Compliance Status Checked By:

1. EMPLOYER AGAINST WHOM CHARGE IS BROUGHT

Name of Employer H. K. Porter Co., Inc., Disston Division-Danville Works

No. of Workers Employed Approx. 350

Address of Establishment (Street and Number, city, zone and State) DANVILLE, VIRGINIA

Nature of Employer's Business (State whether manufacturing, mining, construction, transportation, communication, other public utility, wholesale or retail trade, service, etc., and give principal product or type of service rendered.) MANUFACTURING

Charge Against Employer.

The above-named employer has engaged in and is engaging in unfair labor practices within the meaning of section 8(a), subsections (1) and.....(5)..... of the National Labor Relations Act, and these unfair labor practices are unfair labor practices affecting commerce within the meaning of the act.

2. *Basis of the Charge*

The employer, in bargaining with the union for a contract, has taken a firm and uncompromising position that it will not agree to deduct union dues from the wages of employees pursuant to voluntary authorizations signed by employees in accordance with applicable law. The employer has taken this position for the sole purpose of assuring that no agreement will be reached, and not because of any valid objection to such wage deductions. The employer has, in the past, made deductions from employees' wages, pursuant to authorizations signed by the employees, for all other purposes, including: contributions to the United Fund, purchase of United States Savings Bonds, payments of premiums on optional insurance coverage under the employee insurance program in effect at the plant, purchase of safety shoes, etc. In these circumstances, the employer's position with respect to the deduction of union dues constitutes bad faith bargaining in violation of the Act.

3. Full Name of Organization, Including Local Name and Number, or Person Filing Charge United Steelworkers of America

4. Address (Street and number, city, zone, and State) c/o Feller, Bredhoff & Anker, 1001 Connecticut Ave, NW Washington, D.C. 20036
Telephone No. 737-5353

5. Full Name of National or International Labor Organization of Which It Is an Affiliate or Constituent Unit (To be filled in when charge is filed by a labor organization) ———

6. Address of National or International, if any (Street and number, city, zone and State) ——— Telephone No. ———

7. DECLARATION

I declare that I have read the above charge and that the statements therein are true to the best of my knowledge and belief.

By /s/ Jerry D. Anker

(Signature of representative or person filing charge)

4/20/64 — Jerry D. Anker, Attorney

(Date) — (Title, if any)

WILLFULLY FALSE STATEMENTS ON THIS CHARGE CAN BE PUNISHED BY FINE AND IMPRISONMENT (U.S. Code, Title 18, Section 80)

U.S. Government Printing Office 16-57600-4

Complaint and Notice of Hearing

UNITED STATES OF AMERICA

National Labor Relations Board

(Title omitted in printing)

COMPLAINT AND NOTICE OF HEARING

It having been charged by United Steelworkers of America, AFL-CIO (herein called the Union) that H. K. Porter Company, Inc., Disston Division - Danville Works (herein called Respondent) has been engaging in and is engaging in unfair labor practices affecting commerce as set forth and defined in the National Labor Relations Act, as amended, 29 U.S.C. 151, *et seq.* (herein called the Act), the General Counsel of the National Labor Relations Board (herein called the Board), on behalf of the Board, by the undersigned Regional Director, issues this complaint and notice of hearing pursuant to Section 10(b) of the Act and Section 102.15 of the Board's Rules and Regulations, Series 8, as amended.

I.

A copy of the charge filed in this matter on April 21, 1964 was served on Respondent on or about April 21, 1964.

II.

Respondent is, and at all times material herein has been, a corporation duly organized under, and existing by virtue of, the laws of the State of Delaware and maintains a plant in Danville, Virginia, where it is engaged in the manufacture, sale and distribution of saws and other tools, Only the Danville plant is involved herein.

III.

During a representative 12 months' period, Respondent, in the course and conduct of its business

operations described in par. II above, sold and shipped finished products valued in excess of $50,000 from its Danville plant directly to points outside the Commonwealth of Virginia.

IV.

Respondent is, and at all times material herein has been, engaged in commerce within the meaning of Section 2, subsection (6), of the Act.

V.

The Union is a labor organization within the meaning of Section 2, subsection (5), of the Act.

VI.

All production and maintenance employees of Respondent employed at its Danville, Virginia plant, excluding office clerical employees, professional employees, guards and supervisors as defined in the Act, constitute a unit appropriate for the purposes of collective bargaining within the meaning of Section 9, subsection (b), of the Act.

VII.

On September 27, 1961 a majority of the employees in the unit described in par. VI above, in a secret ballot election conducted under the supervision of the Regional Director for the Fifth Region of the National Labor Relations Board, in the matter of *H. K. Porter Company, Inc.*, Case No. 5-RC-3572, designated and selected the Union as their representative for the purpose of collective bargaining with Respondent, and by virtue of Section 9, subsection (a), of the Act, at all times since that date has been and is now the exclusive representative of all the employees of Respondent in

said unit for the purposes of collective bargaining with respect to rates of pay, wages, hours of employment or other conditions of employment. On October 5, 1961 said Regional Director formally certified the Union as exclusive collective bargaining representative of the employees in said unit.

VIII.

On or about October 5, 1961, and on various dates thereafter, while Respondent was engaged in the operations described above in pars. II, III and IV, the Union requested Respondent to bargain collectively with respect to rates of pay, wages, hours of employment and other conditions of employment with the Union as exclusive representative of all the employees of Respondent in the unit described above in par. VI.

IX.

Since on or about October 21, 1963, and at all times thereafter, Respondent did refuse and continues to refuse to bargain collectively in good faith with the Union as the exclusive representative of all the employees of Respondent in the unit described in par. VI above, in that Respondent negotiated with the Union in bad faith and with no intention of entering into a final or binding collective bargaining agreement by, *inter alia,* adamantly rejecting the Union's proposal for a provision for the deduction of union dues upon the proper authorization and request of individual employees.

X.

Respondent, by its refusal to bargain collectively with the Union as described in par. IX above, as the exclusive representative of its employees in the unit

set forth in par. VI above, did thereby engage in and is thereby engaging in unfair labor practices within the meaning of Section 8, subsection (a) (5), of the Act, and by said Acts and conduct did interfere with, restrain and coerce its employees and is interfering with, restraining and coercing its employees in the exercise of the rights guaranteed in Section 7 of the Act, and did thereby engage in, and is thereby engaging in, unfair labor practices within the meaning of Section 8, subsection (a) (1), of the Act.

XI.

The activities of Respondent described in par. IX above, occurring in connection with the operations of Respondent described in pars. II, III and IV above, have a close, intimate and substantial relation to trade, traffic and commerce among the several States and tend to lead to labor disputes burdening and obstructing commerce and the free flow of commerce.

XII.

The acts of Respondent described above constitute unfair labor practices within the meaning of Section 8, subsections (a) (1) and (a) (5), and Section 2, subsections (6) and (7), of the Act.

PLEASE TAKE NOTICE that on the 6th day of October 1964 at 10:00 a.m. E.S.T. in the Federal Court Room, Post Office and Court House Building, Danville, Virginia, a hearing will be conducted before a duly designated Trial Examiner of the National Labor Relations Board on the allegations set forth in the above complaint, at which time and place you will have the

right to appear in person, or otherwise, and give testimony.

You are further notified that, pursuant to Sections 102.20 and 102.21 of the Board's Rules and Regulations, you shall file with the undersigned Regional Director, acting in this matter as agent of the National Labor Relations Board, an original and 4 copies of an answer to said complaint within 10 days from the service thereof and that, unless you do so, all of the allegations in the complaint shall be deemed to be admitted to be true and may be so found by the Board.

Dated at Baltimore, Maryland this 10th day of August 1964.

JOHN A. PENELLO
Regional Director
National Labor Relations Board
Region Five
[Seal] 707 N. Calvert St., Baltimore, Md.

Excepts From Testimony at Hearing

[1] BEFORE THE NATIONAL LABOR RELATIONS BOARD,

FIFTH REGION

In the Matter of: H. K. PORTER COMPANY, INC. DISSTON DIVISION — DANVILLE WORKS and UNITED STEELWORKERS OF AMERICA, *AFL-CIO*	Case No. 5-CA-2785

U. S. Post Office
Danville, Virginia

Tuesday, October 6, 1964

The above-entitled matter came on for hearing, pursuant to notice, at 10:00 a.m.

BEFORE:

JOSEPH I. NACHMAN, Trial Examiner

APPEARANCES:

EDWARD J. GUTMAN, Esq.
707 N. Calvert Street, Baltimore, Maryland, appearing as counsel for General Counsel.

LLOYD C. JENKINS, Esq.
601 Grant Street, Pittsburgh, Pennsylvania, appearing for the respondent.

JERRY D. ANKER, Esq.
1001 Connecticut Avenue, Washington, D. C., appearing for the charging party.

Excerpts From Testimony at Hearing.

[3] PROCEEDINGS

Trial Examiner Nachman: All right, gentlemen, if we are ready, the hearing will be in order please. This is a formal hearing before the National Labor Relations Board in the matter of H. K. Porter Company, Inc., Case No. 5-CA-2785.

* * * * * * *

[5] *Mr. Gutman*: I have prepared and have the report marked as General Counsel's Exhibit 2 a brief Chronology of some important dates, relative dates, to the issues that are facing you here; and I have placed a copy before you. I have had it marked as an exhibit, strictly so that it will have a place in the record. Its contended as a — for your consideration of the case.

Trial Examiner: Is there any objection to having that as an exhibit? I understand it has no importance or relevance except for the understanding of the past events.

Mr. Jenkins: We assume it to be true to counsel's general knowledge; we have no objections to admitting, subject to verification at a later date.

Trial Examiner: I will receive it on condition that if you discover any error or discrepancy, you can make the correction.

(Thereupon the document above — referred to was marked GC-2 for identification and was received in evidence)

* * * * * * *

[17] *Mr. Jenkins*: May I say one thing on that, sir; we will agree that perhaps our refusal to grant the check-off clause has been harrassment of the International Union. We do not think it has been a harrassment or coercion on the individual employees.

Trial Examiner: Counsel, I'm interested in the question of refusal to bargain; confine your remarks, if you confine your remarks to that, I think we will get along faster.

Mr. Jenkins: The only remarks we have on that, sir, is that we have refused to grant check-off.

Trial Examiner: That's admitted?

Mr. Jenkins: Yes, sir.

* * * * * * *

[19] BRUCE BLOODWORTH was called as a witness by and on behalf of counsel for General Counsel and having first been duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

* * * * * * *

[20] Q. (*By Mr. Gutman*) You are representative for the United Steel Workers?

A. Yes.

Q. The charging party in this case?

A. Yes.

Q. Right?

A. Right.

Q. And in that position, you participated in contract negotiations with H. K. Porter Company?

A. I have.

Q. You testified in the hearing which we referred to, in a preceding case of H. K. Porter?

A. I did.

Q. Let me direct your attention to the period immediately following the Trial Examiner's Decision on that case, which according to Chronology which we submitted was on September 20, 1963; at that time, what was the status in regard to contract negotiations, were you meeting or not meeting — when the Trial Examiner's Decision came out now?

A. On the first case, you are talking about?

Q. Yes.

[21] A. No, we weren't meeting.

Q. You testified in that earlier hearing that the last time that you had met prior to that hearing was November 27, 1962, do you recall that?

A. Yes.

Q. Is that correct?

A. Yes.

Q. Tell us what happened with regard to contract negotiations after the Trial Examiner's Decision in the earlier case?

A. We were notified by the company that they were ready to begin the negotiations, and some time in August, I believe, we received a letter from the company, stating that we would set up dates to begin negotiations again.

Q. Wait a minute; the Trial Examiner's Decision was September 20, 1963, so it couldn't have been August.

A. Could I look at my notes; its been a long time.

Q. Yes.

A. October the 10th, we received the letter, 1963.

Trial Examiner: Had you been in communication with the company between September 20th, and October 10th?

The Witness: No.

* * * * * * *

[22] Q. (*By Mr. Gutman*) After receiving that letter, the parties started meeting again?

A. Yes.

Q. On my instructions, did you go through your notes and prepare a list of the dates on which the parties met, following the Trial Examiner's Decision in that earlier case?

A. Yes.

Q. I hand you what has been marked as General Counsel's Exhibit 3 for identification, and ask you if this is the list that you prepared?

A. Yes.

Q. And that list shows the dates on which negotiation sessions were held between October 23, 1963 down to date?

A. Yes.

• • • • • • •

[23] *Mr. Gutman*: Now, this Exhibit No. 3, it shows that you met 21 times between October 23, 1963 and September 10, 1964. Now, during that period, has an agreement been reached on the terms of the contract?

The Witness: No.

• • • • • • •

[24] *Trial Examiner*: Suppose you tell me this; what are the items that are still under discussion and unresolved?

The Witness: Check-off; we just—

Trial Examiner: Check-off of union dues?

The Witness: That's right. And wages, insurance—

Trial Examiner: What kind of insurance? Health insurance, life insurance?

The Witness: Health insurance.

Trial Examiner: All right.

The Witness: And of course, wages comprise a number of things such as incentive, holidays, shift differentials, and things like that.

• • • • • • •

Excerpts From Testimony at Hearing.

[26] Q. In the earlier case, there was alleged that during the negotiations, or leading up to that case, that respondent had been insisting on the inclusion of the no-strike clause in a contract, and had refused to grant an arbitration; do you recall that?

A. Yes, sir.

Q. What has been the company's position on this item, sir? Since 1963.

A. Up until August 25, 1964, they were adamant on this and [27] refused to budge either way on it.

Q. What happened on August 25, 1964?

A. They agreed to withdraw their demand for a no-strike clause, and also refused arbitration.

Trial Examiner: You mean they withdrew their position on arbitration?

The Witness: A no-strike clause; they still refused to give arbitration.

Q. (*By Mr. Gutman*) But they dropped their demand for the no-strike clause, is that right?

A. That's right.

Q. How many times was this discussed in the 20 meetings up to that point?

A. I would say every time.

Q. And what reason, if any, was given by the company for refusing to grant an arbitration clause?

A. They said that they would not have a third person coming in and settling any disputes.

* * * * * * *

[28] Q. (*By Mr. Gutman*) I ask you whether the company's position on this arbitration — no-strike item was the same or different?

A. The same.

Q. It was the same from October, '63 until August '64 as it was prior to the first hearing?

A. That's right.

[29] Q. Now you stated that your demands keeping the parties apart now are basically wages, insurance, and check-off; now, what's the union's demand on check-off?

A. Well, we have repeatedly asked the company to check off dues, and of course, they have repeatedly refused. In the negotiations, numerous times, we have offered—

Q. Let me ask you a question, first. What has been the reason, if any, given by the company for refusing?

A. That said that it was the union's business, not theirs.

Q. How often has that subject been discussed?

A. I would say every meeting.

Q. Now, did the union suggest any alternative proposals?

A. Yes, on a number of occasions, we asked the company to give us the privilege of having our financial secretary get in a niche somewhere and collect dues during lunch hour and before and after work. They refused to do that; we asked that our shop stewards be allowed to collect dues during lunch periods and before and after the work hours, and they refused to do that.

Q. Did you specify what type of areas this collection would be made?

A. Well, anywhere where people were gathered, eating lunch, or when they were coming into work or after they were finished work.

Q. And what was the company's reaction on that, and their answer?

[30] A. It was still the same. That they would not do it.

Q. And did they give any reason other than the reasons stated before?

A. No.

Q. How many employees are in the unit that you represent, Mr. Bloodworth?

A. At the time of the election, I believe 302.

Q. And at the present time; do you know how many there are?

A. Well, I would say approximately the same, or maybe a few more. I'm not sure.

Q. How often does your union collect dues?

A. Once a month.

Q. Does your union maintain an office in the Danville area?

A. No.

Q. You have no clerical staff in the Danville area?

A. No.

Trial Examiner: Where is the closest office?

The Witness: What?

Trial Examiner: Where is the closest office?

The Witness: Roanoke, Virginia.

Trial Examiner: And that's how far?

The Witness: About 85 miles, I guess, approximately.

Q. (*By Mr. Gutman*) Over how large a geographic area — I'm speaking of the radius from Danville — do the employees of the [31] unit live?

A. I'm not positive, but I would say 35 to 40 miles.

Q. Now if you weren't able — well, let me ask you this; are you at the present time collecting dues?

A. No.

Q. If you would collect dues without a check-off, how would you go about it?

A. Well, we would either have to have our shop stewards call on people at home, or we would have to set up an office in Danville here, and maintain a staff there.

Mr. Gutman: I have nothing further.

Trial Examiner: Does the charging party wish to examine this witness?

Mr. Anker: I just have a couple of questions.

Q. (*By Mr. Anker*) How many employes are there in this unit, approximately?

A. You mean—

Q. In the H. K. Porter plant.

A. At the time of the election, 302, I believe, were eligible to vote; but I would not know exactly; there might be a few more or a few less at the present time; I'm not sure.

Q. Under the present dues structure of the Steel Workers Union, would the dues paid by that number of people be sufficient to support a full-time office staff in Danville, Virginia?

A. It would not.

[32] Q. How long have you been a union representative?

A. A little over 18 years.

Q. On the basis of your experience, in that capacity, would you say that there is any feasible way for a

union in the situation of this local union to collect dues other than by check-off or at the plant?

A. I would think not.

Mr. Anker: I have no further questions.

Trial Examiner: Any cross examination?

Mr. Jenkins: Thank you.

CROSS EXAMINATION

* * * * * * *

[36] Q. To your knowlege and your belief, has the question regarding arbitration and a no-strike clause been satisfactorily resolved between the parties?

A. Repeat that, will you please, sir?

[37] Q. I said to your knowledge and belief, has the question of the no-strike clause and the arbitration clause been satisfactorily resolved by the parties?

A. Not satisfactorily; but we have agreed.

Q. Its no longer an issue?

A. No.

* * * * * * *

[40] FURTHER REDIRECT EXAMINATION

Q. (*By Mr. Anker*) Did you, Mr. Bloodworth, during these negotiations, did you or did you not offer to sign an agreement with this company without the check-off clause?

A. I believe at one time we offered to sign an agreement with them, and waive the check-off clause for six months.

Q. Did you offer to waive the check-off clause for more than six months, if you had some other method of collecting dues?

A. Oh, yes. We made that proposition many times.

Trial Examiner: You mean these alternatives?

The Witness: That's right.

Q. (*By Mr. Anker*) Just so the record is clear, now; specifically, what proposition did you make; or let me ask it this way; specifically, what kind of a contract did you tell the company that you would be willing to sign without a check-off?

A. If they would let us put our financial secretary into some spot in the plant during the lunch periods, or before and after [41] working hours, to collect dues, and if they would not do that, if they would let our shop stewards collect dues in the plant, on the property before and after work or during lunch periods.

* * * * * * *

Excerpts From Testimony at Hearing.

[42] T. C. JONES was called as a witness by and on behalf of the counsel for General Counsel, and having been first duly sworn, was examined and testified as follows:

* * * * * * *

DIRECT EXAMINATION

* * * * * * *

[43] Q. And you are the Plant Manager of H. K. Porter Company?

A. I am.

Q. The respondent in this case?

A. Yes, sir.

Q. How long have you been Plant Manager out there?

A. February, 1962.

Q. You are the top man at the Danville plant?

A. I like to think I am.

Trial Examiner: Well, are you or not?

The Witness: Yes, sir.

Q. (*By Mr. Gutman*) I'll be right direct with you, Mr. Jones, does your company, or has your company in the past made any deductions from payroll, other than those required by law?

A. Yes, sir.

Q. Would you name what the purpose was for which those deductions were made?

A. We deduct Treasure Bonds.

Q. United States Savings Bonds?

A. The United States Savings Bonds. We deduct dependents coverage on the insurance policy; we deduct —

Trial Examiner: That's health insurance?

The Witnes: Yes, sir. And we deduct a United Fund and Good Neighbor Fund.

Trial Examiner: I couldn't hear the last part of your answer; [44] United Fund and what?

The Witness: And the Good Neighbor Fund, which we quit over a year ago.

Q. (*By Mr. Gutman*) The United Fund?
A. Is the local agency.
Q. The local charitable drive that's held once a year?
A. Yes, sir.
Q. And you make deductions from employees' payrolls toward the contribution?
A. Yes.
Q. Now what is this Good Neighbor Fund that you referred to?
A. The Good Neighbor fund that we had, used to be ten cents deducted, that the employee could designate to be deducted, and this was used when somebody passed away, to send flowers to the family of the bereaved, or somebody in the hospital, to send flowers; or to make donations — like they made a donation to the Roman Eagle, the Masonic Home; or donations to the Danville Lifesaving Crew, or if they decided they wanted to have a picnic or a Christmas party, they used this fund.
Q. Now there were many issues to which it could be used — the money in the Good Neighbor Fund. And its a fact that that fund was administered by an organization called the Employees' Activities Committee, whose members were selected by their fellow employees, for a period of one year?
A. Yes.

[45] Q. Is that correct?
A. Yes, sir.
Q. Would you tell us how often these various deductions are made?
A. Weekly.
Q. They are on a weekly basis?
A. That is the United Fund. The Bonds, the United States Savings Bonds, once a month; and insurance, once a month.
Q. And how often was the Good Neighbor Fund collected?
A. That was weekly then.
'It has been discontinued, you know.
Q. Tell us when that was discontinued?
A. I think it was roughly a year ago.
Q. About a year ago?
A. Yes.
Q. Were all these deductions authorized by empolyees?
A. Yes, sir.
Q. In writing?
A. Yes, sir.
Q. They signed their statements and the company has the right to take off so much a week or month or as the case may be, for the stated purpose?
A. Yes, sir.

* * * * * * *

[46] Q. (*By Mr. Gutman*) One more question; do the payroll stubs which accompany your payroll checks; first of all — they are printed? The payroll stubs are printed and they are attached to your payroll checks?
A. Yes; its part of the check.
Q. Excuse me?

A. Its part of the check.
Q. And they contain a place for a Good Neighbor deduction?
A. Yes.
Q. Printed right on the form?
A. Yes. That is used exclusively for United Fund.
Q. Now that's used for the United Fund?
A. Yes, sir.
Q. At one time it was used for both the Good Neighbor Fund and United Fund?
A. Yes, sir.
[47] Q. Does it also contain a space, a hospital deduction?
A. Yes; you have one in front of you there.
Q. And it shows that deduction?
A. Yes, sir.

• • • • • • •

Trial Examiner: Any examination by the charging party?

[48] *Mr. Anker*: A few questions.

Q. (*By Mr. Anker*) Mr. Jones, you were in the room when Mr. Bloodworth testified, were you not?
A. Yes, sir.
Q. His testimony was that the subject was discussed, the subject of check-off was discussed at almost all of your meetings; and the company's consistent position has been that you will not check off union dues, is that correct?
A. That's correct.
Q. He also testified that the union offered to withdraw his request for check-off, if the company were willing to agree to some kind of an arrangement,

whereby the union could collect its dues in the plant, from employees during periods when they were not working?

A. That is correct.

Q. They made that offer?

A. Yes, sir.

Q. What was your position on that?

A. My position is and was then that that's union business.

Q. And therefore—

A. They could colect their own dues at their own meetings or at their offices.

Q. Your position that you would not permit this on the plant grounds?

A. Yes, sir.

[49] Q. You have never taken the position, have you, that there was any inconvenience to the company in checking off union dues?

A. To the best of my knowledge, no, sir, we have not.

Q. In point of fact, there would be no more inconvenience, would it, then checking off Savings Bonds or insurance coverage or United Fund contributions, or any other item?

A. That's right.

Q. As I understand your testimony, I want to get this clear, your sole reason for rejecting the demand for a check-off or for dues collection in the plant was that this was union business?

A. Right; this was union business, and the union should collect their own business; yes, sir. And I should have nothing to do with it.

Q. I have no further questions.

Trial Examiner: Do I understand correctly, Mr. Jones, that you were the company's chief negotiator at the bargaining sessions?

The Witness: Yes, sir.

Trial Examiner: And is it also correct that beginning with the first meeting on October 23, 1963, and down to the one on September 10, 1964, you were present at each meeting?

The Witness: Yes, sir, I don't think I missed any.

Trial Examiner: Go ahead. Cross examination.

[50] CROSS EXAMINATION

* * * * * * *

[51] Q. (*By Mr. Jenkins*) Have you at any time refused to grant the union's demand for a check-off clause for the sole purpose of preventing the parties from reaching an agreement?

A. No, sir, I have not. The check-off, it is union business and I should have nothing to do with it.

Q. What is your position in regards to collection of union dues?

A. That the union should collect their own dues at their own meeting, away from company time, and away from company property.

Trial Examiner: What is your objection to a union official collecting it from employees at the lunch hour, or when coming to or leaving work?

The Witness: I just think that I should not help the union collect their dues, and this is what I am

doing, when I let them collect it on company property, when they can go right to their union meettings that they hold here and collect the dues at the regular meetings they have in town.

Trial Examiner: Suppose they stationed someone at the street entrance of the plant, at the driveway at the plant; would you have an objection to that?

The Witness: Well, I think they would be on State property; I don't know what the State would say about that.

[52] *Trial Examiner*: I say would you have an objection?

* * * * * * *

The Witness: The only objections I would have would be to collecting union dues on company property; if it was off company property, I don't see where I would have any say-so about that.

* * * * * * *

[53] Q. As I understand your testimony, the reason for refusing to grant check-off or collection of union dues, was that you were not going to aid and comfort the union, in the union business?

A. Yes, sir, that's right.

* * * * * * *

REDIRECT EXAMINATION

* * * * * * *

[55] Q. (*By Mr. Anker*) Is there a company policy, that is a policy of H. K. Porter Company, against the check-off of union dues?

A. We do have some contracts at some of our plants that do have check-offs; I do know that.

Q. Is there, to your knowledge, a company policy against the check-off?

A. Being a company policy, not that I know of.

Q. Is there a company policy against the collection of union dues on company property?

A. Not any that I am aware of.

Q. So your position on these matters is not dictated by company policy?

A. That is correct.

Q. Who, then, makes these decisions for the company; who decided to say no to these union demands; who makes that decision?

A. As plant manager, I would make that decision, as chief negotiator.

[56] Q. And you would also make the decision as to whether or not the union would be permitted to collect dues at the plant gate?

A. Well, if it was off company property, I don't have any say-so about that.

Q. But if it was on the edge of the company property, that would be your decision?

A. Well, I can't make any decision affecting anybody else's property.

Trial Examiner: I can't hear you, sir.

The Witness: I can't make any decision affecting anybody else's property.

Trial Examiner: His question is that assuming that this is on company property, it may be at the very edge of it?

The Witness: I would object to it if it was on company property, yes, sir.

Trial Examiner: That would be your decision?

The Witness: Yes, sir.

* * * * * * *

[75] ***Trial Examiner***: All right, sir; I'll hear from the respondent now. Before I do — you were to check General Counsel's Exhibit 3 and let me know—

Mr. Jenkins: We agree that it is authentic.

Trial Examiner: I will now receive General Counsel's Exhibit 3.

[76] (The document heretofore referred to was marked for identification as GC-3, and was received in evidence)

Mr. Jenkins: Mr. Trial Examiner, we've got very little to say. Both counsel have gone to great lengths to give us their opinion of why we have not done something; they agreed that we are not required by law to do it; they simply state that if you pick our brains, and come up with a malignancy, that says the reason we did not do this was to prevent a union, prevent a contract, then we are illegal; they have not shown such a malignancy, and they cannot show it because it is not there.

Trial Examiner: Let me ask you this, first; do you agree that if the finder of fact came to that conclusion, would that be the answer to this case; in other words, that's the turning point in this case?

Mr. Jenkins: We agree that that's the turning point of the case, yes, sir.

We point out, now, sir, that elsewhere, in H. K. Porter and elsewhere in industry, there are contracts that have union dues check-offs; those of which I am personally familiar arrived, the check-off clause was put in the contract because of economic pressures put on the bargaining by the union.

Trial Examiner: I am confined to this record, and I have to confine you to the record. Its in the record that there are other contracts with the H. K. Porter Company that have [77] union check-off provisions; and there is nothing in the record as to why they have.

Mr. Jenkins: What I was going to say is this, that the proper relief and the proper manner for the union to press their demand against the hard bargaining of the company is by use of their economic pressures, and not by coming to the Board and asking the Board to grant them union dues check-off . . . ." Its a subject that is mandatory for bargaining; it is not one — and counsel agrees — that we do not have to grant; if they feel that our reason for not doing is as they have stated, then they have economic pressures that they could

put against us, and use those economic pressures to change our opinion.

Trial Examiner: They don't have to, though.

Mr. Jenkins: That, I think, is debateable, sir, whether they do or not; again, we get down to the turning point.

Trial Examiner: I suppose economic pressure is a strike?

Mr. Jenkins: Yes, sir.

Trial Examiner: They don't have to call a strike; if there's other ways—

Mr. Jenkins: Well, that gets back again, as you say, to the turning point of this case; whether our sole purpose in denying check-off was to prevent a signing of an agreement, then we state our purpose was that we were not going to aid and comfort the International Union at this location.

* * * * * * *

[80] *Trial Examiner*: Counsel has pointed to certain facts in the record that he argues should support, and asked me to draw the inference of bad faith bargaining. Now, if you will summarize your evidence and give me the facts which you think should dictate the contrary, then we will have an issue drawn; and then I hope I will be able to reach a decision.

Mr. Jenkins: Well, sir, you stated just now that they have referred to certain facts; and okay, we agree that they have, to certain testimony, to certain proof. We say that their whole summation was

not that these things bear out what they are saying, but that you should surmise and read behind these facts; we agreed to most of the testimony that was here; we would have stipulated everything. We do have check-offs or deductions for payrolls for other things; we think that the fact that we have it has no bearing on whether or not we have to have a deduction for union dues. The law requires—

Trial Examiner: Isn't the fact that you grant it in one place and not at another, I'm not saying that that's controlling, but doesn't it have some evidentury weight that this position was taken here for a purpose?

Mr. Jenkins: Well, certainly, and we have stated our purpose; we have stated it plainly here many times, that our purpose in denying check-off was that we were not going to aid and comfort the union; it had nothing to do with blocking; it had nothing to do with blocking reaching an agreement, sir.

[81] *Trial Examiner*: It has the same effect in every other plant we do have such an agreement.

Mr. Jenkins: Are we going into outside plants or not, sir, there again.

Trial Examiner: The record here shows that that provision does exist in contracts at other plants.

Mr. Jenkins: It has been alleged that that provision is in other contracts, yes, sir.

Trial Examiner: Your witness, Mr. Jones, admitted that it does exist. Now, in those places where

it exists, doesn't it have exactly the same effect that it would in this particular plant; it aids and abets the union in collection of dues?

Mr. Jenkins: And in — yes; and in those plants, we are forced to do it because of economic pressures of the union to grant them that clause; not because of any other reason. We took the same position here that we would not grant the union a check-off, that we would not let them have — most of our contracts read that there will be no conduct of union business on company property, on company time.

Trial Examiner: Why don't you want them, aside from the fact that you don't want to aid the union; is there any other disadvantage to the company, or detriment to the company by having them collect dues during non-work hours?

Mr. Jenkins: Only one that would not necessarily be a hard-[82]ship or anything else — the added confusion in a plant such as ours; the added risk of an outsider who is not familiar with the lay-out of the plant; perhaps suffering from injury or something — other than that, there would be no objection.

* * * * * * *

Mr. Jenkins: Well, sir, I'm just not prepared or qualified to go down through the evidence point by point other than saying that it is our strong conviction that we did not come to the bargaining table with the intent of denying check-off for the sole purpose of preventing an agreement. We claim that we have presented offers, counter-offers, and complete agreements to [83] the union, which we were ready, able, and willing to sign. Now, the union

comes before you and says that because you do not include in those documents a provision for either (1) union dues check-off or (2) a manner in which they could collect the union dues on our property, that we have violated the law. We say that we have violated the law no more in our position than they have in theirs; that they will not sign a contract without such a clause or provision being included into it. Now, as we understand the law, and has been employed by the Board, we are not required to make concessions; we have made known to the bargaining representatives our reasons for not granting them their various requests; why their counter proposals weren't satisfactory to us, and we continue to hear from the union that "Mr. Employer, we are going to get union dues check-offs; either you give it to us, or we are going to haul you before the Board". Today, we are before the Board, and they would ask that you grant them something that they cannot get any other way.

Trial Examiner: No; I don't think that's the result at all. I think that most that could happen here, assumed that I agree with the General Counsel's case, is that I will order the company to bargain over that issue; that doesn't mean that you have to agree to it.

Mr. Jenkins: So we bargain for another 20 or 200 or 400 meetings —

[84] *Trial Examiner*: Its a question of whether you bargain in good faith; if the conclusion is that you bargain in good faith, and don't reach an agreement,

its just an impasse, that's all; that happens lots of times.

Mr. Jenkins: Yes, sir, and I have been in a number of them; in fact, I've got two going on right now.

Trial Examiner: If that impasse has been brought about by bad faith bargaining, then its bad faith.

Mr. Jenkins: Well, sir, we can only tell you that we came to the bargaining table as we came to this hearing; with a sound firm position that we would not deny check-off for the sole purpose of denying, as claimed in the Petition, denying the union a contract.

Trial Examiner: Well, I suppose I should expect that; if you said to the contrary, we wouldn't have a case.

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General Counsel's Exhibit No. 2.

General Counsel's Exhibit No. 2

CHRONOLOGY

1. September 27, 1961 — Election in Case No. 5-RC-2572.
2. October 5, 1961 — Union certified by Board.
3. January 24, 1963 — Charge filed by Union in Case No. 5-CA-2344.
4. April 22, 1963 — Complaint in Case No. 5-CA-2344.
5. May 23, 1963 — Hearing in Case No. 5-CA-2344.
6. September 20, 1963 — Trial Examiner's Decision in Case No. 5-CA-2344.
7. April 15, 1964 — Board Order in Case No. 5-CA-2344.
8. April 21, 1964 — Charge filed herein.
9. July 17, 1964 — Decree of Fourth Circuit enforcing Board Order in Case No. 5-CA-2344.
10. August 10, 1964 — Complaint issued herein.

General Counsel's Exhibit No. 3.

General Counsel's Exhibit No. 3

NEGOTIATION SESSIONS BETWEEN UNITED STEELWORKERS AND H. K. PORTER SINCE SEPTEMBER 20, 1963

1. October 23, 1963
2. October 29, 1963
3. November 13, 1963
4. November 26, 1963
5. December 4, 1963
6. January 8, 1964
7. January 22, 1964
8. February 11, 1964
9. March 10, 1964
10. March 11, 1964
11. March 24, 1964
12. April 7, 1964
13. April 14, 1964
14. April 28, 1964
15. May 12, 1964
16. June 3, 1964
17. July 2, 1964
18. July 28, 1964
19. August 11, 1964
20. August 25, 1964
21. September 10, 1964

Trial Examiner's Decision

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF TRIAL EXAMINERS
WASHINGTON, D. C.

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION-DANVILLE WORKS
and
UNITED STEELWORKERS OF AMERICA,
AFL-CIO

Case No. 5-CA-2785

Edward J. Gutman, Esq., of
Baltimore, Md., for the
General Counsel.

Jerry D. Anker, Esq., of
Washington, D. C., for the
Charging Union.

Mr. Lloyd C. Jenkins, Pittsburgh,
Pa., for the Respondent.

Before: *Joseph I. Nachman,* Trial Examiner.

TRIAL EXAMINER'S DECISION
STATEMENT OF THE CASE

This complaint,[1] under Section 10(b) of the National Labor Relations Act (herein called the Act), charges that H. K. Porter Company, Inc., Disston Division, Danville Works (herein called Respondent or Company), since on or about October 21, 1963, violated Section 8(a)(5) of the Act by refusing to bargain with

1. Issued August 10, on a charge filed and served April 21. All dates mentioned are 1964, unless otherwise noted.

United Steelworkers of America, AFL-CIO (herein called the Union), the duly certified representative of Respondent's employees involved in this proceeding. The matter was duly heard before the undersigned Trial Examiner at Danville, Virginia, on October 6, 1964, with all parties represented and participating in the hearing. Full opportunity was afforded all parties to present pertinent evidence, to examine and cross-examine witnesses, to argue orally on the record, and to submit briefs. Oral argument was presented and is included in the transcript of proceedings at the hearing. Additionally, a formal brief has been received from the Union and from Respondent, respectively, and further arguments in letter form have been received from the General Counsel. All arguments submitted as aforesaid, have been duly considered.

Upon the entire record in the case and my observation of the witnesses, including their demeanor while testifying, I make the following:

FINDINGS OF FACT[2]

I. The Unfair Labor Practices Alleged

A. *Background*

Following a secret ballot election, the Regional Director for the Fifth Region of the Board, on October 5, 1961, certified the Union as the collective-Bargaining representative of all production employees at Respond-

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2. No issue of commerce or labor organization is presented. The complaint alleges and the answer admits facts which adequately establish both elements. I find the facts as pleaded. Likewise, no unit question is presented. The unit was fixed in the representation proceeding, and I find the same to be appropriate.

ent's Danville, Virginia, plant excluding office clerical employees, professional employees, guards and supervisors as defined in the Act. The unit comprises about 300 employees who live within a radius of 35 to 40 miles from Danville. The Union maintains no office in Danville, that area being serviced from the Union's office in Roanoke, a distance of about 85 miles.[3]

Following the certification, and through November 27, 1962, the parties had 28 bargaining sessions, but no agreement was reached. The chief negotiator for Respondent at the meetings was Plant Manager Jones. Based on charges filed by the Union, the Regional Director, on April 22, 1963, issued a complaint charging Respondent with bad-faith bargaining during the aforementioned negotiations (Case No. 5-CA-2344). That complaint was heard before Trial Examiner Ramey Donovan on May 23, 1963, and his Decision issued September 20, 1963. He found that in the aforementioned negotiations, the main items that kept the parties apart were, in addition to money matters, Respondent's refusal to agree to (1) an arbitration provision although it insisted on a no-strike clause; and (2) a dues checkoff provision. Trial Examiner Donovan concluded that Respondent's position on the arbitration and no-strike provisions, and its unilateral changes in certain working conditions (which it had refused to grant to the

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3. The uncontroverted testimony is to the effect that the Union's membership in the Danville area does not justify the maintenance of an office in that area, but one of the Union's members employed by Respondent, maintains some files and records at his home, and mail relating to the Union's business in Danville may be addressed to the home of that individual.

Union), demonstrated that its bargaining during the aforementioned negotiations, was not in good faith. The Trial Examiner's Recommended Order required Respondent to cease and desist from refusing to bargain with the Union; upon request to bargain with the Union, and to post appropriate notices. No exceptions having been filed, the Board on April 15, 1964, adopted the Trial Examiner's Recommended Order.[4]

B. The current facts

After issuance of Trial Examiner Donovan's Decision, Respondent and the Union resumed bargaining, the first meting being held October 23, 1963. Between that date and September 10, 1964, a total of 21 meetings were held,[5] but no agreement was reached. Plant Manager Jones was again Respondent's chief negotiator, attending all bargaining sessions on and after October 23, 1963. When bargaining negotiations were resumed, some 14 items were open and unresolved. During the negotiations which followed, each of the parties withdraw certain of its bargaining proposals,[6] so that upon

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4. On July 17, 1964, the United States Court of Appeals for the Fourth Circuit entered a Decree summarily enforcing the Board's Order.

5. The precise meeting dates were (1) October 23, 1963; (2) October 29, 1963; (3) November 13, 1963; (4) November 26, 1963; (5) December 4, 1963; (6) January 8; (7) January 22; (8) February 11; (9) March 10; (10) March 11; (11) March 24; (12) April 7; (13) April 14; (14) April 28; (15) May 12; (16) June 3; (17) July 2; (18) July 28; (19) August 11; (20) August 25; and (21) September 10; meetings 6 through 21 being in 1964. Since September 10, no meetings have been held.

6. For example the Union withdrew its demand for arbitration, and Respondent withdrew its demand for a no-strike clause.

adjournment of the final meeting on September 10, only 3 items remained unresolved. These were wages, health and life insurance, and checkoff. It is undisputed that checkoff was discussed at virtually each of the 21 meetings held after negotiations were resumed on October 23, 1963, and that Respondent refused to grant the Union's request in that regard contending that the collection of union dues was the Union's business which Respondent should not foster or promote. In view of this position by Respondent, the Union's negotiator proposed, at several meetings, two alternatives, namely (1) that its financial secretary be given access to the plant for a given period of time when dues were due, with leave to contact the employees during the lunch period, or before or after work; or (2) that the Union's stewards be permitted to collect dues in the plant during nonworking hours. Both of these suggestions were rejected by Plant Manager Jones on the ground ". . . we are not going to aid and comfort the International Union at this location" and "I should not help the Union collect their dues, and this is what I am doing when I let them collect it on company property . . ."

Jones admitted that his objection to the Union's demand for a checkoff, and the alternatives advanced by the Union, was not a matter of company policy, but was a decision made by him as manager of the one plant involved, and Respondent's chief negotiator; that in fact other plants of Respondent have union contracts containing a checkoff provision, but claims that these came into existence because of the economic strength of the Union at the particular plant. Jones also admitted that his refusal to check off union dues was not based on inconvenience to Respondent; that it would be no more in-

convenient than checking off for the purchase of U.S. Savings Bonds, dependents coverage under health insurance, United Givers Fund, and a Good Neighbor Fund, for which Respondent does deduct from its employee's wages when appropriately authorized.[7]

CONTENTIONS AND CONCLUDING FINDINGS

There can be no doubt that check off is a mandatory subject of collective bargaining, and that with respect to such issue either party may bargain to an impasse provided such bargaining is in good-faith. *N.L.R.B.* v. *Borg-Warner Corporation,* 356 U.S. 342. And Section 8(d) of the Act provides that nothing therein shall be construed as requiring either party to agree to a proposal, or the making of a concession. But this statutory right to refuse to agree to a particular proposal or to make a concession, may not be used "as a cloak . . to conceal purposeful strategy to make bargaining futile or fail." *N.L.R.B.* v. *Herman Sausage Co.,* 275 F. 2d 229, 232 (C. A. 5). In short, what is required is a good-faith approach to the issues between the parties with a serious intent to reach ultimate agreement on an acceptable common ground. *N.L.R.B.* v. *Insurance Agents,* 361 U.S. 477.

The narrow issue thus presented by this record, is whether, as the General Counsel contends, Respondent's position on the Union's demands for a check off was a mere device to frustrate agreement on a contract, or

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7. The Good Neighbor Fund was a weekly deduction of 10 cents to cover the expense of sending flowers to a sick fellow employee, donation to some charity, and other like matters. It was discontinued about a year prior to the hearing herein.

whether, as Respondent contends, it was merely engaging in "hard bargaining," with no intention of preventing an agreement. My careful consideration of the entire record convinces me that Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the check off issue, for the purpose of frustrating agreement with the Union, and hence engaged in bad-faith bargaining. I base this conclusion on the following factors:

1. In the prior case Jones' surface bargaining, designed to frustrate agreement with the Union, except on the terms he adamantly insisted upon, was established. Indeed the excerpts from Jones' testimony in the prior case, quoted in Trial Examiner Donovan's Decision, clearly demonstrate his antiunion animus, and his attitude that the Union was an evil he was required by law to tolerate and deal with, but he would prevent it from having any more voice in the working conditions of the employees than he was required to permit, and would seize any opportunity that presented itself to embarrass the Union in the sight of its employee members. Jones' demeanor while testifying in the instant proceeding, convinced me that his attitude toward collective bargaining had not changed since he testifed in the prior case.[8]

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8. I fully recognize that because an employer engaged in bad-faith bargaining in one set of negotiations, it does not necessarily follow that the employer's subsequent bargaining negotiations were conducted in bad faith. I merely hold that an employer's bad-faith bargaining in the prior negotiations is a factor to be considered, along with the other circumstances of the case, in determining whether his subsequent bargaining was in good faith.

2. Jones' explanation for his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act. The very act of bargaining with a union, thus granting it recognition as the representative of the employees, in and of itself gives aid, comfort, assistance and prestige to that Union. But the policies of the Act, and the basic principles upon which it rests, requires an employer to give this kind of "aid and comfort" to the designated representatives of its employees. For, as the Board had held in a somewhat comparable situation, it is inconsistent with the bargaining obligation which the Act imposes upon an employer for the latter to conduct negotiations with the statutory representative in such a manner as to disparage or discredit the statutory representative in the eyes of its employee constituents. *General Electric Company,* 150 NLRB No. 36.

3. In the instant case Respondent seeks to explain away the fact that at other plants it has contracts with unions which provide for a check off, by arguing, in substance, that those provisions were brought about by reason of the economic strength of the union there involved, and urges that the Union's remedy in this case was to call a strike rather than prosecute an unfair labor practice charge. Not only does such a position by an employer run counter to the objectives of the Act which Congress set forth in its statement of "Findings and Policies" (see Section 1 of the Act), but it also demonstrates that Respondent's purpose was to forestall reaching an agreement with the Union by the expedient

of disparaging the latter in the eyes of the employees. Cf. *Sunbeam Plastic Corporation,* 144 NLRB 1010. This would seem to be particularly true in view of Respondent's admission that checking off union dues would impose no burden upon it, and its admitted check off for Government Bond and United Givers Fund, neither of which seem particularly necessary for the promotion of Respondent's business.

Accordingly, I find and conclude that with respect to the issue of check off, Respondent bargained with the Union from October 23, 1963, through September 10, 1964, in bad faith and thereby violated Section 8(a)(5) and (1) of the Act[9].

Upon the basis of the foregoing findings of fact, and upon the entire record in the case, I made the following:

CONCLUSIONS OF LAW

1. Respondent is an employer within the meaning of Section 2(2) of the Act, and is engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

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9. This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. Also, I find it unnecessary to pass on the contention advanced by the Charging Union, but not urged by the General Counsel, that Respondent independently violated Section 8(a)(5) and (1) of the Act, by rejecting the Union's alternatives to its original checkoff proposal, because in any event the order which I shall recommend would be the same.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By failing to bargain in good faith with the Union over the issue of check off, as set forth above, Respondent engaged in, and is engaging in unfair labor practices proscribed by Section 8(a) (5)and (1) of the Act.

4. The aforesaid unfair labor practices are unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

Having found that Respondent has engaged in unfair labor practices, I shall recommend that it cease and desist therefrom, and that it take the affirmative action hereafter set forth, which is deemed necessary to effectuate the policies of the Act.

RECOMMENDED ORDER

Upon the basis of the foregoing findings of fact and conclusions of law, and pursuant to Section 10(c) of the National Labor Relations Act, as amended, it is recommended that H. K. Porter Company, Inc., its officers, agents, successors and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steel Workers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in a unit composed of all production and maintenance employees at its Danville, Virginia, plant, excluding office clerical employees, professional employees, guards and supervisors as defined in said Act, with respect to

rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action found necessary to effectuate the policies of said Act:

(a) Upon request bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive representative of the employees in the aforesaid unit, and embody any understanding reached into a signed contract.

(b) Post at its plant in Danville, Virginia, copies of the notice attached hereto marked "Appendix."[10] Copies of said notice to be furnished by the Regional Director for the Fifth Region of the Board (Baltimore, Maryland), shall, after being signed by an authorized representative of Respondent, be posted by Respondent

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10. In the event this Recommended Order be adopted by the Board, the words "A DECISION AND ORDER" shall be substituted for the words "THE RECOMMENDED ORDER OF A TRIAL EXAMINER" in the notice. In the further event that the Board's Order be inforced by a decree of a United States Court of Appeals the words "A DECREE OF THE UNITED STATES COURT OF APPEALS ENFORCING AN ORDER" shall be substituted for the words "A DECISION AND ORDER."

immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director, in writing, within 20 days from the date hereof, what steps it has taken to comply herewith.[11]

Dated at Washington, D.C.

/s/ Joseph I. Nachman
Joseph I. Nachman
Trial Examiner

(Appendix to Decision omitted in printing)

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11. If this Recommend Order be adopted by the Board, this provision shall be modified to read: "Notify said Regional Director in writing within 10 days from the date of this Order, what steps Respondents have taken to comply herewith."

Decision and Order of July 9, 1965

153 NLRB No. 119

D-8108
Danville, Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

H. K. PORTER COMPANY, INC.
DISSTON DIVISION-DANVILLE WORKS
and
UNITED STEELWORKERS OF AMERICA,
AFL-CIO

Case No. 5-CA-2785

DECISION AND ORDER

On January 21, 1965, Trial Examiner Joseph I. Nachman issued his Decision in the above-entitled proceeding, finding that the Respondent had engaged in and was engaging in certain unfair labor practices, and recommending that it cease and desist therefrom and take certain affirmative action, as set forth in the attached Trial Examiner's Decision. Thereafter, the General Counsel and Respondent filed exceptions to the Trial Examiner's Decision and supporting briefs. The Charging Party filed cross-exceptions and a brief in support thereof and in opposition to the exceptions filed by the Respondent. Thereafter, Respondent filed answering briefs.

Pursuant to the provisions of Section 3(b) of the National Labor Relations Act, as amended, the National Labor Relations Board has delegated its powers in connection with this case to a three-member panel.

The Board has reviewed the rulings of the Trial Examiner made at the hearing and finds that no prejudicial error was committed. The rulings are hereby affirmed. The Board has considered the Trial Examiner's Decision, the exceptions, cross-exceptions, all briefs, and the entire record in this case, and hereby adopts the Trial Examiner's findings, conclusions, and recommendations.

Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby adopts as it Order the Recommended Order of the Trial Examiner, and orders that Respondent H. K. Porter Company, Inc., Disston Division-Danville Works, Danville, Virginia, its officers, agents, successors, and assigns, shall take the action set forth in the Trial Examiner's Recommended Order.

Dated, Washington, D. C. July 9, 1965.

JOHN H. FANNING, Member
GERALD A. BROWN, Member
HOWARD JENKINS, JR., Member
NATIONAL LABOR RELATIONS BOARD

May 19, 1966 Opinions and Order of Court of Appeals

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Resondent

No. 19,507

H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

Petitions to Review, and Cross-Petition to Enforce, an Order of the National Labor Relations Board
Decided May 19, 1966

Mr. Michael H. Gottesman, with whom *Mr. Elliot Bredhoff* was on the brief, for petitioner in No. 19,492.

Mr. Donald C. Winson, of the bar of the Supreme Court of Pennsylvania, *pro hac vice,* by special leave of court, with whom *Messrs. Bartholomew A. Diggins, Daniel W. Sixbey* and *Paul R. Obert* were on the brief, for petitioner in No. 19,507.

Mr. Elliott Moore, Attorney, National Labor Relations Board, with whom *Messrs. Arnold Ordman,* General Counsel, *Dominick L. Manoli,* Associate General Counsel, *Marcel Mallet-Prevost,* Assistant General Counsel, and *Morton Namrow,* Attorney, National Labor Relations Board, were on the brief, for respondent.

Before BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

WRIGHT, *Circuit Judge*: These cases are before the court on petitions filed by both the union and the employer to review a final order of the National Labor Relations Board. The Board has filed a cross-petition to enforce its order requiring the company to bargain in good faith.

Pursuant to a secret ballot election, the union was certified on October 5, 1961, as the collective bargaining representative of all production employees at the employer's Danville, Virginia, plant. After four years of bargaining and two orders from the Board requiring the employer to cease and desist from refusing to bargain collectively with the union, the second of which included the provision that the employer also cease and desist from "interfering with, restraining or coercing employees in the exercise of their right to self-organization * * *," no agreement has been reached. It is the second order which is the subject of these proceedings, the first order having been summarily enforced on July 17, 1964, by the United States Court of Appeals for the Fourth Circuit after the company filed no exceptions to the trial examiner's findings or proposed order. See 61 STAT. 147 (1947), 29 U.S.C. § 160(c).

The narrow issue presented by the present proceeding, according to trial examiner, is "whether, as the General Counsel contends, [the employer's] position on the Union's demands for a check off was a mere device to frustrate agreement on a contract, or whether, as [the employer] contends, it was merely engaging in 'hard bargaining,' with no intention of preventing an agreement." The trial examiner concluded that the employer's refusal to grant a check-off was "for the purpose of frustrating agreement with the Union and hence [the employer had] engaged in bad-faith bargaining." The Board, through a three-member panel convened pursuant to Section 3[1] of the National Labor Relations Act, adopted the trial examiner's findings, conclusions, recommendations and proposed order.

The employer, citing *Universal Camera Corp. v. N.L.R.B.*, 340 U.S. 474 (1951), maintains that the trial examiner's finding that the company refused to agree to a dues check-off provision in order to frustrate an agreement is not supported by substantial evidence on the record considered as a whole. It argues, that, while Section 8(d)[2] of the Act requires good faith bargaining, it does not compel either party to agree to a proposal or require the making of a concession. Our study of the record, however, convinces us that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the company's adamant refusal to consider a union dues check-off for those employees who individually requested it did indeed frustrate the bargaining.

In the prior proceeding, in which the Board likewise found violations of Sections 8(a)(5)[3] and (1)[4] of the Act, in addition to making unilateral changes in working conditions which it had refused to grant the union, the company had also refused to agree to an arbitration provision while insisting on a no-strike clause. This insistence, the Board found, demonstrated bad faith bargaining on the part of the company contrary to the observation in *Textile Workers Union v. Lincoln Mills*, 353 U.S. 448, 455 (1957), that "* * * the agreement to arbitrate grievance disputes in the *quid pro quo* for an agreement not to strike."

In spite of the Board's order in the prior proceeding, it was not until ten months and 20 bargaining sessions following its issuance that the company receded from the position which the Board had found to amount to an unfair labor practice. When bargaining was resumed after the Board's prior order, some 14 items were open and unresolved. At the time of the final meeting on

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1. 73 STAT. 542 (1959), 29 U.S.C. § 153(b).
2. 61 STAT. 142 (1947), 29 U.S.C. § 158(d).
3. 61 STAT. 141 (1947), 29 U.S.C. § 158(a)(5).
4. 61 STAT. 140 (1947), 29 U.S.C. § 158(a)(1).

Sections 8(a)(1) and (5) of the Act read:

"(a) It shall be an unfair labor practice for an employer —

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

* * * * * * * *

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 9(a)."

September 10, 1964, only three items remained unresolved, the union having given in on all of the others.[5]

Throughout the negotiations, both before the prior order and subsequent to it, the union had insisted on a dues check-off. The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a check-off, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation.[6]

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5. The representative of the union testified, without contradiction, as follows:

Q. When parties began meeting in October of 1963, how many items were there that the union was demanding; before they would agree to a contract?

A. Fourteen.

Q. Your testimony is that they are now demanding three?

A. Well, actually, it covers a number of things.

Q. What's happening to those issues that you didn't refer to in your testimony earlier?

A. In the hopes of getting an agreement, the union gradually held twenty meetings, and dropped all those demands except those I mentioned.

The examiner reported that subsequent to the Board's prior order "each of the parties withdrew certain of its bargaining proposals." With reference to the company's concessions, the examiner is apparently referring to the withdrawal of the company's no-strike clause demand without arbitration, which withdrawal was required by the Board's prior order.

6. The check-off is included in 92 per cent of all contracts in manufacturing industries. See BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, p. 87:3. Most of the contracts not containing check-off provide some alternative method of dues collection on company property. *Id.* at p. 87:901.

The company admitted that it had no general policy against a dues check-off; that indeed in some of its divisions the bargaining agreements so provide.[7] The company admitted, too ,that the refusal to check off union dues at the Danville plan was not based on inconvenience.[8] As a matter of fact, the Danville plant was check-

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7. Q. Is there a company policy, that is a policy of H. K. Porter Company, against the check-off of union dues?
   A. [By Witness T. C. Jones, chief negotiator for the company] We do have some contracts at some of our plants that do have check-off, I do know that.
   Q. Is there, to your knowledge, a company policy against the check-off?
   A. Being a company policy, not that I know of.
   Q. Is there a company policy against the collection of union dues on company property?
   A. Not any that I am aware of.
   Q. So your position on these matters is not dictated by company policy?
   A. That is correct.

8. Q. You have never taken the position, have you, that there was any inconvenience to the company in checking off union dues?
   A. [By Witness Jones, chief negotiator] To the best of my knowledge, no, sir, we have not.
   Q. In point of fact, there would be no more inconvenience, would it, than checking off Savings Bonds or insurance coverage or United Fund contributions, or any other item?
   A. That's right.
   Q. As I understand your testimony, I want to get this clear, your sole reason for rejecting the demand for a check-off or for dues collection in the plant was that this was union business?
   A. Right; this was union business, and the union should collect their own business; yes, sir. And I should have nothing to do with it.

ing off from the salaries of its employees for purchase of United States savings bonds, dependents' coverage under health insurance, United Fund, and a Good Neighbor Fund.[9] The company's position, as stated by its counsel and by its chief negotiator, was simply that "our purpose in denying check-off was that we were not going to aid and comfort the union."[10]

It is clear from the record in this case that the prior order of the Board, drawn, as is the order in suit here,

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9. Q. I'll be right direct with you, Mr. Jones [chief negotiator], does your company, or has your company in the past made any deductions from payroll, other than those required by law?
   A. Yes, sir.
   Q. Would you name what the purpose was for which those deductions were made?
   A. We deduct Treasury Bonds.
   Q. United States Savings Bonds?
   A. The United States Savings Bonds. We deduct dependents coverage on the insurance policy; we deduct—

   Trial Examiner: That's health insurance?

   The Witness: Yes, sir. And we deduct a United Fund and Good Neighbor Fund.

10. Q. [By counsel for the company] As I understand your testimony, the reason for refusing to grant check-off or collection of union dues, was that you were not going to aid and comfort the union, in the union business?
   A. [By Witness Jones, chief negotiator] Yes, sir, that's right.

in terms of the statute,[11] requiring the company to bargain in good faith, was ineffective. Instead of starting a new Section 10(b)[12] proceeding, the Board no doubt could have requested the Fourth Circuit to cite the company for contempt for continuing failure to bargain in good faith. Certainly a succession of Section 10(b) proceedings resulting in Board orders cast in statutory language is not the answer where refusal to bargain persists. In order to eliminate further frustration of the purposes of the Act. [13] The union suggests that the Board should have included in its order a provision requiring the company to withdraw its objection to the dues check-off. Moreover, the union suggests that, since the company not only refused the check-off but also refused to allow the union to collect dues during non-working hours on non-working areas of the company premises,[14] a further provision should be included in the Board's order protecting this statutory right as well.

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11. Section 8(a)(5), 29 U.S.C. § 158(a)(5).

12. 61 STAT. 146 (1947), 29 U.S.C. § 160(b).

13. 61 STAT. 143 (1947), 29 U.S.C. § 159. See also 61 STAT. 141 (1947), 29 U.S.C. § 141.

14. Q. Mr. Jones [chief negotiator], you were in the room when Mr. Bloodworth testified, were you not?
A. Yes, sir.
Q. His testimony was that the subject was discussed, the subject of check-off was discussed at almost all of your meetings; and the company's consistent position has been that you will not check off union dues, is that correct?
A. That's correct.
Q. He also testified that the union ordered to withdraw his request for check-off, if the company

It is true, as the company contends, that under Section 8(d)[15] it cannot be compelled to agree to a proposal or make a concession. But neither can refusal to make concessions be used "as a cloak * * * to conceal a purposeful strategy to make bargaining futile * * *." *N.L.R.B. v. Herman Sausage Co.*, 5 Cir., 275 F.2d 229,

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were willing to agree to some kind of an arrangement, whereby the union could collect its dues in the plant, from employees during periods when they were not working?

A. That is correct.
Q. They made that offer?
A. Yes, sir.
Q. What was your position on that?
A. My position is and was then that that's union business.
Q. And therefore —
A. They could collect their own dues at their own meetings or at their offices.
Q. Your position that you would not permit this on the plant grounds?
A. Yes, sir.

* * * * * * *

Trial Examiner: What is your objection to a union official collecting it from employees at the lunch hour, or when coming to or leaving work?

The Witness: I just think that I should not help the union collect their dues, and this is what I am doing, when I let them collect it on company property, when they can go right to their union meetings that they hold here and collect the dues at the regular meetings they have in town.

15. Section 8(d), 29 U.S.C. § 158(d), reads in part: "For the purposes of this section 1, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reason-

232 (1960). "Collective bargaining, then, is not simply an occasion for purely formal meetings between management and labor, while each maintains an attitude of 'take it or leave it'; it presupposes a desire to reach ultimate agreement, to enter into a collective bargaining contract." *N.L.R.B. v. Insurance Agents' Union,* 361 U.S. 477, 485 (1960).

While it is clear from the record that the company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues check-off,[16] it is not necessary to include a specific reference to the check-

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able times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."

16. Footnote 9 in the trial examiner's findings reads in part:

> "This is not to say that the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled. * * *"

This footnote is inconsistent with the trial examiner's faith bargaining." To suggest that in further bargain-Union and hence [the company had] engaged in bad-was "for the purpose of frustrating agreement with the finding that the Company's refusal to grant a check-off ing the company may refuse a check-off for some other

off in the Board's order. [17] Nor, in the circumstances of this case is it necessary to provide in the order that the union shall have the right to collect dues during non-working hours on non-working areas of the company's premises.[18] In any contempt proceeding, the record made before the Board in both Section 10(b) proceedings will be available to this court. Thus we will be in a position to make a judgment based not only on the Board's order, but on the entire record of this company's performance at the bargaining table.

Affirmed and enforced.

WILBUR K. MILLER, *Senior Circuit Judge,* dissenting in No. 19,507: It is my view that the Labor Board's decision, here under review, is not supported by substantial evidence when the record is considered as a whole in the manner described and prescribed by *Universal Camera Corp. v. Labor Board,* 340 U.S. 474 (1951). Consequently, I cannot agree with my brothers of the majority when they say in their opinion:

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reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded.

17. Compare *J. I. Case Co. v. N.L.R.B.*, 321 U.S. 332, 341 (1944); *Burr v. N.L.R.B.*, 5 Cir., 321 F. 2d 612, 615 (1963).

18. It would serve no useful purpose to have another § 10(b) proceeding to require the company to allow the union to collect dues during non-working hours on non-working areas of the company's premises. The issue was raised in these proceedings and the company offered no good reason for its flat refusal to allow the dues collection on its premises. Compare *Republic Aviation Corp. v. N.L.R.B.*, 324 U.S. 793 (1945); *N.L.R.B. v. Walton Manufacturing Company,* 5 Cir., 289 F.2d 177 (1961).

> ". . . Our study of the record, however, convinces us that the Board's findings are supported by substantial evidence on the record considered as a whole, and that the company's adamant refusal to consider a union dues check-off for those employees who individually requested it did indeed frustrate the bargaining."

The union was just as adamant in refusing to sign a contract which did not contain a checkoff clause or some other means of company aid in collecting union dues. Its representative informed the Company's negotiator of this firm purpose, and counsel for the Board's General Counsel (the charging party) told the examiner that his inquiry showed the union would not sign a contract without a checkoff. Thus, the union never intended to bargain on that issue; it simply stated it must have a dues collection provision or there would be no contract. In these circumstances, it is difficult for me to understand how it can be said that the Porter Company's position on the checkoff issue "did indeed frustrate the bargaining." Because of the union's attitude on the issue—its stated determination not to negotiate in good faith with respect to it—bargaining as to a checkoff provision was impossible from the beginning. Yet it is the Company, not the union, which has been found guilty of an unfair labor practice.

The examiner's decision, adopted by the Board, dwelt on the union's need for a checkoff which could be granted by the Company without inconvenience to itself. And the majority opinion notes the union's consistent insistence on a dues checkoff and attempts to justify it by saying:

> ". . . The union maintains no office in Danville, that area being serviced from Roanoke, Virginia, a distance of about 85 miles. Moreover, the 300 company employees live within a radius of from 35 to 40 miles from Danville. Thus without a checkoff, or some adequate substitute therefor, the collection of dues would have presented the union with a substantial problem of communication and transportation."

But the record shows the union has a mailing address at the home of a member in Danville. Members could mail their dues to that address or to the office in Roanoke, or dues could be collected at the monthly union meetings. Moreover, it was shown that the union has a potential income of $1,500 per month from the Danville members, which would seem to justify the establishment of a small office in that town where dues could be paid. Thus there was no real necessity for the union's unalterable insistence on a checkoff clause.

Nevertheless, the examiner said in his decision:[1]

> ". . . I find and conclude that with respect to the issue of checkoff, Respondent [the Company] bargained with the Union from October 23, 1963, through September 10, 1964, in bad faith and thereby violated Section 8(a) (5) and (1) of the Act."

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1. Without discussion or comment, a three-member panel of the Board adopted the examiner's findings, conclusions and recommendation. So we must turn to the latter's decision to ascertain the findings and conclusions which the Board adopted as its own.

He also stated:

> ". . . My careful consideration of the entire record convinces me that Plant Manager Jones, Respondent's chief negotiator, took the position he did with respect to the checkoff issue, for the purpose of frustrating agreement with the Union, and hence engaged in bad-faith bargaining . . ."

He said he based the foregoing conclusion upon three "factors," which I here reproduce, largely in his own words:

> 1. That the demeanor of T. C. Jones, the Company's negotiator, while testifying in the present proceeding, "convinced me that his attitude toward collective bargaining had not changed since he testified in the prior case."[2]
>
> 2. "Jones' explanation for [*sic*] his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in collecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act." This reason for refusing to agree to a checkoff tended, the examiner said, to disparage or discredit the union in the eyes of the employees.
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> 3. "In the instant case Respondent seeks to explain away the fact that at other plants it has contracts with unions which provide for a checkoff, by arguing, in substance, that those provisions

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2. The "prior case" is discussed later in this dissent.

were brought about by reason of the economic strength of the union there involved, and urges that the Union's remedy in this case was to call a strike rather than prosecute an unfair labor practice charge. Not only does such a position by an employer run counter to the objectives of the Act which Congress set forth in its statement of 'Findings and Policies' (see Section 1 of the Act) but it also demonstrates that Respondent's purpose was to forestall reaching an agreement with the Union by the expedient of disparaging the latter in the eyes of the employees. Cf. *Sunbeam Plastic Corporation,* 144 NLRB 1010. This would seem to be practicularly true in view of Respondent's admission that checking off union dues would impose no burden upon it, and its admitted checkoff for Government Bond and United Givers Fund, neither of which seem particularly necessary for the promotion of Respondent's business."

Thus, it is apparent the examiner base his conclusion that the Company had bargained in bad faith upon three "factors," none of which rises to the level of proof: (a) that Jones's demeanor showed antiunion animus, and (b) that two of the positions taken by the Company during bargaining tended to disparage or discredit the union in the eyes of the employees. Nothing else in the record was pointed out by the examiner as supporting his conclusion, and I have discovered nothing which in the slightest degree supports it. His conclusion, then, stands or falls on the validity of the antiunion animus and union disparagement "factors" which he expressly set forth.

Antiunion animus on the part of an employer, even if shown by the record, is not an unfair labor practice. *Metal Processors' Union* v. *N.L.R.B.*, 119 U.S. App. D. C. 78, 81, 337 F. (2d) 114, 117 (1964). For that reason, the first of the three "factors" upon which the examiner relied to support his conclusion of bad-faith bargaining falls of its own weight, even if the examiner's holding of Jones's alleged antiunion animus had been borne out by the record. But here the examiner did not purport to base his finding of antiunion animus on any evidence in the record, but merely on his own statement that "Jones' demeanor while testifying in the immediate proceeding convinced me that his attitude toward collective bargaining had not changed since he testified in the prior case."

The "prior case" to which the examiner referred arose from a complaint charging the Porter Company with bad-faith bargaining because, after 28 bargaining sessions between November 3, 1961, and November 27, 1962, the parties had not reached an agreement. The recommended order of the examiner in the prior case, issued with his decision on September 20, 1963, required the Company, upon request, to bargain with the union. Without waiting for the Board's decision,[3] the Company began almost immediately to bargain with the union as ordered by the examiner in the prior case. The parties met in 21 bargaining sessions, beginning October 23, 1963, and ending September 10, 1964. These meetings, the subject of the present proceeding, were fruitful. Of the 14 issues which were open and unresolved when the meetings began October 23, 1963, 11

3. Which for some reason not stated was not issued until April 15, 1964.

were resolved by the process of bargaining, so that only three remained unresolved at the adjournment of the final session on September 10, 1964. These were wages, health and life insurance, and checkoff.

The examiner in the earlier case did not find that Jones had antiunion animus; the present examiner decided that for himself from a reading of the prior examiner's dicision, and then concluded that Jones's demeanor in the present proceeding showed he still had that animus. The present examiner said in this connection:

> "I fully recognize that because an employer engaged in bad-faith bargaining in one set of negotiations, it does not necessarily follow that the employer's subsequent bargaining negotiations were conducted in bad faith. I merely hold that an employer's bad-faith bargaining in the prior negotiations is a factor to be considered, along with the other circumstances of the case, in determining whether his subsequent bargaining was in good faith."

Although the examiner found that, with respect to the checkoff issue the Company bargained with the union in bad faith and ordered resumption of bargaining, he expressly disclaimed any intention to require the Company to agree to aid in the collection of dues. Footnote 9 to the examiner's decision contains the following:

> "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of checkoff. I only find and conclude that on that issue Respondent did not heretofore bargain in good

> faith, and that it should be required to do so. If after such good-faith bargaining, the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled . . ."

Thus the examiner gave lip service to Section 8(d) of the Act, 29 U. S. C. § 158 (d), which is in part as follows:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment . . . *but such obligation does not compel either party to agree to a proposal or require the making of a concession* . . . " (Emphasis supplied.)

But his decision that, by not agreeing to a dues collection provision, which he thought the union badly needed and which would cause it no inconvenience, the Company had not bargained in good faith, left no room for doubt that what he termed good-faith bargaining would require the Company to yield on the checkoff issue. This is, of course, contrary to the express provision of the statute quoted above.

This leaves for consideration the other two "factors" upon which the examiner based his conclusion of bad-faith bargaining on the part of the Company. First, as he put it,

> "Jones' explanation for his refusal to agree to any of the Union's suggestions for the collection of its dues, namely, that he did not wish to give aid and comfort to the Union by assisting it in col-

lecting dues, if not actually a false reason, evidences an attitude inconsistent with the obligation imposed upon an employer by the Act. The very act of bargaining with a union, thus granting it recognition as the representative of the employees, in and of itself gives aid, comfort, assistance and prestige to that Union. But the policies of the Act, and the basic principles upon which it rests, require an employer to give this kind of 'aid and comfort' to the designated representatives of its employees. For, as the Board had held in a somewhat comparable situation, it is inconsistent with the bargaining obligation which the Act imposes upon an employer for the latter to conduct negotiations with the statutory representative in such a manner as to disparage or discredit the statutory representative in the eyes of its employee constituents. *General Electric Company,* 150 NLRB No. 36."

The second "factor" was another statement of the Company, to which I have heretofore referred. The examiner said it showed the emloyer's purpose "was to forestall reaching an agreement with the Union by the expedient of disparaging the latter in the eyes of the employees."

The examiner was indeed hard put to it when he concocted these two "factors" as bases for his conclusion. He confused the union with its members and eroneously thought an employer is somehow required to avoid any act which may disparage or discredit a union in the eyes of the employees. The Act is for the benefit of employees and not unions and, as Mr. Justice Rut-

ledge said, "Nothing in the act requires an employer to maintain a union's prestige . . ."[4]

Additionally, I pointed out that the examiner did not expressly find that the Company said or did anything which actually disparaged or discredited the union; he merely said disparaging or dsicrediting a union is inconsistent with an employer's duty under the Act. As Mr. Justice Rutledge said, 326 U. S. at 399, "Something more than mere supposition should underlie a conclusion which supports a finding of unfair practice."

The fact that the examiner's three "factors" fall so far short of supporting his conclusion of bad-faith bargaining on the part of the Company, and the further fact that the record considered as a whole is devoid of support for his conclusion, lead me to think the examiner was actuated by antimanagement animus. The three-member panel of the Board which rubber-stamped the examiner's decision either did so without examining the record or, I suggest, shared his antimanagement animus.

Before concluding I call attention to the following statement in the majority opinion:

> ". . . When bargaining was resumed after the Board's prior order, some 14 items were open and unresolved. At the time of the final meeting on September 10, 1964, only three items remained unresolved, *the union having given in on all of the others.*" (Emphasis supplied.)

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[4]Concurring in part in May Stores Co v. Labor Board, 326 U. S. 376, 398 (1945).

The italicized clause is erroneous. Even the examiner did not go so far; on this subject, his decision said:

> ". . . During the negotiations which followed, each of the parties withdrew certain of its bargaining proposals, so that upon adjournment of the final meeting on September 10, only 3 items remained unresolved. These were wages, health and life insurance, and checkoff. . . ."

I have heretofore quoted a portion of the examiners footnote 9 to show that even he realized he could not order the Company to agree to a checkoff because Section 8(d) of the Act provides that the mutual obligation of an employer and a union to confer in good faith

> ". . . does not compel either party to agree to a proposal or require the making of a concession. . . ."

With respect to this the majority opinion says in footnote 16:

> "Footnote 9 in the trial examiner's findings reads in part:
>
> > " 'This is not say that in the resumed bargaining sessions which I shall recommend, Respondent will be reqired to agree to some form of check off I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled * * *' "

This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a check-off was 'for the purpose of frustrating agree-

> ment with the Union and hence [the company had] engaged in bad-faith bargaining.' To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute. Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded."

Thus, in holding the examiner's footnote 9 should be disregarded, the majority hold in effect that Section 8(d) of the Act should be disregarded, and that the Company should be held in contempt if, on remand, it does not agree to a contractual provision for some sort of Company aid in the collection of union dues.

I have seldom seen a record so barren of support for the decision of the examiner and the Board, and I earnestly dissent from the majority opinion which upholds that decision.

I concur in the affirmance of No. 19,492.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD RESPONDENT.
v.
H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE Works, Petitioner,
v.
NATIONAL LABOR RELATIONS BOARD, Respondent.

No. 19,492
September Term, 1965
No. 19,507

On Petitions to Review, and Cross-Petition to Enforce, an Order of the National Labor Relations Board.

Before: Bazelon, Chief Judge, Wilbur K. Miller, Senior Circuit Judge, and Wright, Circuit Judge.

ORDER

These cases came on to be heard on the record from the National Labor Relations Board and on petitions to review, and cross-petition for enforcement of, the order of the National Labor Relations Board herein, and were argued by counsel.

On consideration whereof, it is ORDERED and DECREED by this court that the order of the National Labor

Relations Board on review in t hese cases is affirmed, and that it shall be enforced.

Pursuant to Rule 38 ( ) the respondent shall within 10 days hereof serve and file a pr posed enforcement decree consistent with the opinion f this court.

per C ircuit Judge Wright

Dated: May 19, 1966

Separate opinion by Senior C ircuit Judge Wilbur K. Miller dissenting in No. 19,507, and concurring in affirmance of No. 19,492.

Motion to Cla ify.

IN THE UNITED STATES CO URT OF APPEALS
FOR THE DISTRICT OF CO LUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner

v.

NATIONAL LABOR RELA TIONS BOARD,
Respondent

No. 19,507

H. K. PORTER COMP ANY, INC.,
DISSTON DIVISION-DANV LLE WORKS,
Petitioner

v.

NATIONAL LABOR RELA TIONS BOARD,
Respondent

Motion of United Steelworkers of America, AFL-CIO, to Clarify an Earlier Decree of This Court in the Above-Captioned Proceeding

United Steelworkers of America, AFL-CIO, hereinafter "the Steelworkers" or "the Union," request that this Court clarify its earlier decree issued in the above-captioned proceeding and advise the parties that the terms of such decree require that the Company agree to the Union's request for a contractual dues checkoff provision. In support of its Motion, the Union shows as follows:

1. *The Opinion of this Court*

a) On May 19, 1966, this Court (per Bazelon, C. J. and Wright, J. Miller, J. dissenting) issued its decision (.... U.S. App. D.C. ...., 363 F. 2d 272), affirming and enforcing an order of the National Labor Relations Board (153 NLRB No. 119) finding that H. K. Porter Company, hereinafter "the Company," had violated Section 8 (a) (5) and (1) of the National Labor Relations Act as amended, 29 U. S. C. 158 (a) (1) and (5).

b) In essence, as reflected clearly throughout its comprehensive opinion, the Court held that the Company failed to bargain in good faith in that it refused to agree to the Union's request for a dues checkoff provision in the contract being negotiated for "no reason, other than to frustrate the bargaining procedure ....." The Court found that at the Company's Danville plant, monies were checked off from the salaries of employees for the purchase of U.S. savings bonds, dependants' coverage under health insurance, United Fund and a Good Neighbor Fund. The Court found that the Company's admitted position with respect to the Union's request for dues checkoff was simply that its "purpose in deny-

ing checkoff was that we were not going to aid and comfort the Union." (*supra,* 363 F. 2d at 275). This, the Court held, was not a valid basis under the statute for refusing the Union's request. Significantly, the Court further observed that the Company was foreclosed from raising in any subsequent negotiations any other reasons, not heretofore advanced, as a basis for refusing a checkoff provision. At footnote 16 of its opinion, the Court observed (*id* at 276):

> Footnote 9 in the trial examiner's findings reads in part: "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled * * *"
>
> This footnote is inconsistent with the trial examiner's finding that the company's refusal to grant a checkoff was "for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining."
>
> *To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute.* Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded." (Emphasis added).

2. *Subsequent Events*

a) Subsequent to the issuance of the Court's opinion, the Company filed a petition for certiorari. Pending the Supreme Court's decision whether to grant certiorari, the Company filed a motion in this Court to stay the decree. In response to the Union's opposition to any such stay, the Company on June 21, 1966 replied, in part, that "the effect of the opinion and order of the Court is to require the Company to agree to a dues checkoff provision. This, the Company contends, would be most unfair . . . ." On October 10, 1966, the Supreme Court denied the Company's petition for certiorari (385 U.S. 851).

b) Thereafter, by letter dated October 12, 1966, the Union requested that a meeting be held with the Company to implement the decree of this Court by agreeing upon a dues checkoff provision. (See Exhibit A attached hereto). Pursuant to this request, a meeting was attended by representatives of both parties on Thursday afternoon, October 27, at the Hotel Danville in Danville, Virginia.

c) Shortly after the meeting convened, a dispute arose as to the meaning of this Court's decision. As explained by plant manager Carl Vischer, the Company interpreted the decision as meaning that it was not obligated to agree to a dues check-off provision in the contract, but rather that it was obligated only to provide some form of assistance to the Union with respect to the collection of dues. The Union's representative, on the other hand, advised the Company that it interpreted the decision to require the Company to agree to a check-off provision. In reliance particularly upon footnote 16

of the decision, the Union took the position that the Company had to agree to a checkoff because it was now foreclosed from attempting to raise any further reasons, not heretofore advanced,[1] upon which it could base any objection to a contractual dues checkoff provision.

3. *The Nature of the Controversy; the Need for Clarification*

a) In view of the disagreement between the parties over the legal interpretation of the Court decision, the bargaining session adjourned. The Company thereafter by letter dated November 3, 1966 advised the Union, in part, as follows: (See Exhibit B attached hereto):

> "At the meeting held here on October 27 between the representatives of the Company and the Union, you stated that under the Union's interpretation of the recent Court of Appeals decision, the Company was obligated to agree to a dues checkoff provision; that is, the collection of Union dues by the Company through payroll deductions . . . It is our position that the court order requires us to bargain with the Union in good faith in an attempt to establish a system of dues collection at the plant

---

1. Curiously enough, the only objection to a contractual dues checkoff provision voiced by the Company at this meeting was that this was "Union business." As the Union's representative pointed out to the Company, this was the precise reason which the Company had previously given in attempting to justify its refusal to grant a contractual dues checkoff provision and which the trial examiner, the Board and ultimately this Court, rejected as not constituting a valid basis for denying the Union's request.

which is acceptable to both the Company and the Union. The Company will not be coerced into making an outright gift of a dues checkoff provision simply because the Union thinks the court has ordered us to do so."

b) In sum, it seems self-evident that the lone disagreement here relates to the question whether this Court's decree required the Company to incorporate a dues checkoff provision in the contract. It is our understanding that all other matters have been resolved. A contract has been entered into effective December 1, 1966 covering all terms and conditions of employment (see Exhibits C and D attached hereto), except the question of dues checkoff; the parties have agreed that that question was to be resolved in accordance with the terms of the Court's decree but, as mentioned above, that problem remains unresolved to date precisely because of the disagreement over the interpretation to be placed upon that decree. This disagreement, in turn, raises only a legal issue.

c) In such circumstances, the Union has elected initially to file the instant motion to clarify rather than to request the Board to commence contempt action against the Company. Our reasons for doing so are two: first, it is our understanding that there are no material issues of fact in dispute which would require resort to the more time-consuming contempt litigation route; and, second, we anticipate that if the instant motion is granted and the Court clarifies its decree, the Company would undoubtedly comply with such interpretation and thus eliminate the need for any contempt proceeding.

4. *The Clarification of the Decree*

We submit that a reasoned interpretation of the Court's decree requires that the Company agree to the Union's request for a contractual dues checkoff provision. Indeed, as mentioned above, the Company itself acknowledged this fact in its earlier motion for a stay. Equally important, the notion that this Company could subsequently raise a valid objection to a contractual dues checkoff provision was firmly laid to rest by this Court at footnote 16 of its opinion. There, the Court expressly rejected the Trial Examiner's reasoning that the Company was *not* required to agree to a dues checkoff provision in subsequent negotiations. As the Court properly observed (*id* at 276): [t]o suggest that in further bargaining the Company may refuse a checkoff for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute."

WHEREFORE, the Steelworkers respectfully request that its motion to clarify be granted and that the Court advise the parties that the terms of its prior decree require that the Company agree to the Union's request for a contractual dues checkoff provision.

Bredhoff & Gottesman
by Elliot Bredhoff,

Michael H. Gottesman
George H. Cohen
1001 Connecticut Ave., N.W.
Washington, D.C.
Attorneys for United Steelworkers of America, AFL-CIO, the movant herein.

(Dated February 24, 1967)

(Certificate of Service omitted in printing)

Exhibit "A"

October 12, 1966

Mr. C. V. Vischer, Plant Manager
H. K. Porter Co., Inc.
P. O. Box 3000
Danville, Virginia 24541

Dear Mr. Vischer:

On October 10, 1966 entered an order on case Re: H. K. Porter Company Inc., v. NLRB.

Therefore the Union is demanding the Company to provide the check-off in the contract that was agreed upon as of date October 1, 1966 and that date must be included in the copies sent to me by Mr. Wilson.

Very truly yours,

Ted Jennings
Sub-District Director

TJ: il

cc: M. C. Weston
Michael Gottesman

Exhibit "B"

November 3, 1966

Mr. Ted Jennings
United Steel Workers of America
2823 Williamson Road N. E.
Box 5544
Roanoke, Virginia

Dear Mr. Jennings:

At the meeting held here on October 27th between representatives of the Company and the Union you stated that under the Union's interpretation of the recent Court of Appeal's decision the Company was obligated to agree to a dues check-off provision; that is, the collection of Union dues by the Company through payroll deductions. You stated that the Union would not discuss any program for dues collection other than dues check-off.

It is our position that the court order requires us to bargain with the Union in good faith in an attempt to establish a system of dues collection at the plant which is acceptable to both the Company and the Union. The Company will not be coerced into making an outright gift of a dues check-off provision simply because the Union thinks that the court has ordered us to do so. This, in our view, is not bargaining.

We are more than willing to discuss with you any reasonable program for the collection of Union dues from our employees which is convenient, effective, and satisfactory to both the Union and the Company, and to explore all avenues for reaching agreement on such a program. We do not think, however, that discussions

between us can be limited only to the subject of dues check-off.

We earnestly request a meeting at the earliest possible date for this purpose.

Very truly yours,

Carl V. Vischer
Plant Manager

CVV/tj

cc: J. W. Puth
T. P. Luscher
G. Cohen

Exhibit "C"

December 15, 1966

Mr. Ted Jennings
United Steelworkers of America
2823 Williamson Rd. N. E.
Box 5544
Roanoke, Virginia

Dear Mr. Jennings:

Confirming our phone conversation this morning, we have received the signed copy of the contract, and note that the effective date is back-dated to October 1, 1966.

Since we were still negotiating on a contract October 27th here in Danville, and corresponding with you in November on the subject, we request that the effective date be changed to December 1, 1966, which would be the approximate date of signing by the officials of the United Steelworkers.

We hope that this request meets with your approval.

Very truly yours,

Carl V. Vischer
Plant Manager

CVV/jt

cc: W. E. Wilson

Exhibit "D"

January 24, 1967

Mr. Carl V. Vischer, Plant Manager
H. K. Porter Company
P. O. Box 3000
Danville, Virginia

Dear Mr. Vischer:

Due to changes made in contract and to correspondence. The Union agrees to date of December 1, 1966 as date on contract between H. K. Porter Company and United Steelworkers of America AFL-CIO.

Yours truly,

Ted Jennings
Sub-District Director

TJ:il

cc: M. C. Weston

Opposition to Motion to Clarify.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 19,492
H. K. PORTER COMPANY, INC., DISSTON DIVISION — DANVILLE WORKS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent.	No. 19,507

Opposition of H. K. Porter Company, Inc. to Motion of United Steelworkers of America to Clarify an Earlier Decree of This Court

H. K. Porter Company, Inc., the Petitioner in the above-captioned Case No. 19,507, hereby opposes the Motion filed by United Steelworkers of America in which the Union requests that this Court clarify its earlier decree issued in the above-captioned cases and advise the parties that the terms of such decree require the Company to agree to the Union's demand for a contractual dues check-off provision. In support of its opposition to the Union's Motion, the Company states as follows:

1. *The Motion Is Not Timely Filed And Is Not Procedurally Proper.*

On May 19, 1966, this Court filed its Order in the above-captioned cases, affirming the Order of the National Labor Relations Board which was on review in

these cases. Now, over nine months later, the Union requests that this Court clarify its Order. Although this Court does not have any procedural rules specifically governing motions for clarification, it certainly would appear that a period of over nine months constitutes an unreasonable delay in asking any federal court of appeals to clarify an order. If Rule 59(e) of the Federal Rules of Civil Procedure is applicable to the Union's Motion, that Rule specifically requires that a motion to alter or amend a judgment shall be served not later than ten days after entry of the judgment. The ten-day requirement as contained in Rule 59(e) serves to emphasize the gross untimeliness of the Union's Motion.

In its Motion For Leave to File Out of Time, the Union states that it is "self-evident from reading said Motion to Clarify why it could not have been filed within ten days of the Court's decree." We fail to see the so-called "self evident" reason. If the Union means that it did not know at that time that the Company disagreed with its interpretation of the Order, we point out that the Union knew on May 19, 1966 that this Court had refused the Union's request that a provision be included in the Order requiring the Company to agree to a dues check-off provision. Furthermore, as admitted by it in the Motion, the Union was aware of the Company's interpretation of the Order at least as early as November 3, 1966.

In the prayer for relief in its Motion, the Union asks this Court to "require that the Company agree to the Union's request for a contractual dues checkoff provision." This is precisely the relief which the Union sought from this Court in the above-captioned Case No. 19,492. The Board had denied this relief to the Union

and this Court, by affirming the Board's Order, likewise denied this relief to the Union. The effect of all this is that the Union is not asking merely for clarification of the earlier Order, but is asking that the earlier Order be amended or altered so as to give the Union the exact relief which the Board and this Court denied to it over nine months ago. As noted above, Federal Rule 59 (e) requires that a motion to alter or amend a judgment be served not later than ten days after entry of the judgment. Also, this Court's own Rule 26 provides that petitions for rehearing must be filed "within 15 days after judgment or decision."

2. *The Actual Order Entered By This Court Is Clear and Unambiguous.*

The Order entered by this Court on May 19, 1966 in the above-captioned cases expressly stated "that the Order of the National Labor Relations Board on review in these cases is affirmed, and that it shall be enforced."

In the Order of the National Labor Relations Board which was so affirmed by this Court, the Board expressly stated that it "adopts as its Order the Recommended Order of the Trial Examiner."

The Recommended Order of the Trial Examiner, as so adopted by the National Labor Relations Board and as so affirmed by this Court, expressly ordered the Company to "cease and desist from refusing to bargain collectively" with the Union and "upon request bargain collectively" with the Union.

Thus, there is no need for clarification of this Court's Order. It is clear and unambiguous in ordering

the Company to bargain collectively with the Union, upon request.

3. *The Interpretation of This Court's Order Requested By The Union Is Contrary To Law.*

The Union in its Motion is asking the Court to order the Company to agree to a dues check-off provision in the collective bargaining agreement. Such an order would be directly contrary to the express mandates of both the Congress and the United States Supreme Court.

Section 8 (d) of the National Labor Relations Act expressly states that good faith bargaining "does not compel either party to agree to a proposal or require the making of a concession."

In *NLRB v. American National Ins. Co.*, 343 U.S. 395, 404 (1952), the Supreme Court said:

> "And it is equally clear that the Board may not, either directly or indirectly, compel concessions or otherwise sit in judgment upon the substantive terms of collective bargaining agreements."

It is clear, therefore, that the relief sought by the Union in its present Motion is precluded by law.

WHEREFORE, H. K. Porter Company, Inc. requests that the Union's Motion for Clarification be denied.

Respectfully submitted,

DANIEL W. SIXBEY
DIGGINS & O'BOYLE
1010 Vermont Avenue, N.W.
Washington, D. C. 20005
Attorneys for
H. K. Porter Company, Inc.

Of Counsel:

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ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219

(Dated March 3, 1967)

(Certificate of Service omitted in printing)

Reply to Opposition.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent	No. 19,492
H. K. PORTER COMPANY, INC., DISSTON DIVISION — DANVILLE WORKS, Petitioner, v. NATIONAL LABOR RELATIONS BOARD, Respondent	No. 19,507

Reply to Opposition of H. K. Porter Company, Inc. to Motion of United Steelworkers of America to clarify an Earlier Decree of This Court

United Steelworkers of America, AFL-CIO, hereinafter 'the Union', replies to the opposition submitted by H. K. Porter Company, Inc. (hereinafter 'the Company') to its motion to clarify as follows:

1. Contrary to the position of the Company, the Union's instant motion is neither a request for rehearing nor a motion to alter a decree of this Court. Rather, the touchstone of the Union's motion is a request that the Court clarify its earlier decree because of events which occurred subsequent to the decree. In these circumstances, the time limits set forth in Rule 59 (e) of the Federal Rules of Civil Procedure and/or Rule 26 of this Court, upon which the Company relies in contending

that the Union's motion is untimely, are clearly inapplicable.

As the Company's own memorandum acknowledges impliedly (at page 3), the Union was not apprised of the Company's interpretation of this Court's decree of May 19, 1966 prior to November, 1966. Until that time — that is, until the Company advised the Union that it did not construe the decree as requiring it to agree to the Union's request for a contractual dues checkoff provision — it was not even clear that a dispute existed as to what the Court decree meant. Indeed, the Union had good reason to believe that the Company interpreted the decree as requiring that it agree to a dues checkoff provision; for this is precisely what the Company advised this Court that the decree meant. See the Company's June 21, 1966 response to the Union's opposition to its request for a stay of this Court's decree. Plainly, therefore, it was not until five months had elapsed from the date of the decree of this Court that the instant dispute became evident. In such circumstances, it is untenable even to suggest that the ten-day time limit set forth in Rule 39 (e) could be apposite here. The simple fact is that there is no statute of limitations for filing the instant motion, just as there is no such limitation for bringing a contempt action.

2. The Company next contends that the order entered by this Court is clear and unambiguous. That order, the Company claims, was merely an affirmance of the Board order which, in turn, adopted the Trial Examiner's Recommended Order. It is well settled, however, that a Court order takes its meaning in large part from the entire decision of the Court which gave rise to such order. And here, it is the Union's contention that

the entire decision of this Court, and most particularly footnote 16 therein (see the Union's original motion), persuasively establishes that in the instant circumstances the Company could not have satisfied its duty to bargain in good fatih subsequent to the Court order, unless it agreed to a contractual dues checkoff provision. The Company now purports to disagree with this interpretation, although, as indicated above, it has previously agreed with this interpretation. This, then, is precisely the matter which the Union seeks to have clarified in the instant motion. In these circumstances, we submit that the Company's superficial assertion (page 5) that the Court merely ordered the Company "to bargain collectively with the Union upon request" and that therefore this order is "clear and unambiguous," is disingenuous.

WHEREFORE, the United Steelworkers of America, AFL-CIO, requests that its motion for clarification be entertained and the Court clarify its earlier decree as requested by the Union.

Respectfully submitted,

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE H. COHEN
Attorneys for the Movant,
United Steelworkers of America,
AFL-CIO.

(Dated March 8, 1967)

(Certificate of Service omitted in printing)

Motion for Reconsideration.

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent

No. 19,507

H. K. PORTER COMPANY, INC.,
DISSTON DIVISION-DANVILLE WORKS,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD,
Respondent

Motion of United Steelworkers of America, AFL-CIO, Requesting the Court to Reconsider an Earlier Motion to Clarify the Decree Entered in the Above-Captioned Proceedings.

This is the most recent in a comprehensive series of legal steps initiated by the United Steelworkers of America, AFL-CIO (hereinafter "the Union") in what has been to date a singularly unsuccessful effort to compel the National Labor Relations Board to interpret correctly the decision and order entered by this Court in the above-captioned proceeding. That decision is re-

ported at ..... U.S. App. D.C. ....., 363 F.2d 272 (May 19, 1966).

Rather than to repeat all of the relevant facts which underlie our position here, we shall merely refer the Court to our initial motion to clarify that decree. The motion is self-explanatory. Essentially, it recites that the Court (per Bazelon, C.J. and Wright, J.; Miller, J. dissenting) held that the Company failed to bargain in good faith when it refused to agree to the Union's request for a dues checkoff provision in the contract negotiations for "no reason, other than to frustrate the bargaining procedure. . . ." The Court found that at the Company's Danville plant, monies were checked off by the Company from the salaries of employees for the purchase of U. S. savings bonds, dependents' coverage under health insurance, United Fund and a Good Neighbor Fund. The Court also found that the Company's "purpose in denying checkoff was that we were not going to aid and comfort the Union". (*supra*, 363 F.2d at 275). This, the Court held, was not a valid basis under the statute for refusing the Union's request.

Significantly, the Court further observed that the Company was foreclosed from raising in any subsequent negotiations any other reasons, not heretofore advanced, as a basis for refusing a checkoff provision. At footnote 16 of its opinion, the Court observed (*id* at 276):

> "Footnote 9 in the trial examiner's findings reads in part: 'This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in

good faith, and that it should be required to do so. If after such good-faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled * * *"

This footnote is inconsistent with the trial examiner's finding that the Company's refusal to grant a check-off was "for the purpose of frustrating agreement with the Union and hence [the company had] engaged in bad-faith bargaining." *To suggest that in further bargaining the company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute.* Since the text of the trial examiner's decision controls, Footnote 9 should be disregarded." (Emphasis added).

Based on the foregoing rationale the Union interpreted the Court opinion to mean precisely what it said — namely, that in subsequent negotiations the Company could not in good faith refuse a contractual checkoff provision. But in the post-decree negotiations, the Company urged a completely contrary interpretation of the decree of this Court. Thus, it was the Company's position that the decree merely meant that it was obligated to bargain anew concerning some form of dues collection assistance to the Union. To this end, the Company proposed discussions concerning the possibility of making available a table in the payroll office which could be utilized for the collection of dues.

The Union, on the other hand, asserted that the opinion of this Court expressly recognized (*id.* at 276) that employees had a statutory right to collect dues in non-working areas of the plant during non-working hours, separate and apart from the requirement that

in the circumstances here the Company was also obliged to agree to a contractual dues checkoff provision. In other words, the Union interpreted the Court decree as entitling it to both channels of dues collection, whereas the Company construed the decree as requiring it only to negotiate about making the former channel available to the Union.

Precisely because the thrust of this dispute in our view centered upon these two competing legal interpretations of the Court decree, the Union initially filed (on February 28, 1967) a Motion to Clarify that decree. The Court denied the motion; significantly, however, in so doing, it issued an invitation to the Board to test the mentioned competing interpretations of the decree through the agency's contempt procedure. The order of the Court was entered on March 22, 1967.

Thereafter, by letter dated April 3, 1967, the Union requested that the Regional Director initiate contempt proceedings consistent with the Court order.[1] The Board, however, has seen fit not to do so. Instead, by letter dated June 22, 1967, (attached hereto as Exhibit B) the Union was merely apprised by the Board, as follows:

> The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisions of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order

1. Attached hereto as Exhibit A is a copy of the Union's letter setting forth the Court order in full.

and does not preclude further proceedings should subsequent violations occur.

It is thus apparent that the Board, in disagreement with the legal position of the Union, has accepted the Company's interpretation of the Court order as requiring only that it now bargain with the Union concerning some form of dues collection assistance. Both parties furnished the agency with a statement as to their post-decree negotiations; there is not now nor has there ever been any factual dispute as to what transpired in said negotiations. The Board's mentioned latter ostensibly closing this case is silent — and quite properly so— as to any resolution of disputed factual issues. In such circumstances, then, there can be no question but that the Board closed the case plainly and simply because it construed the Court decree consistent with the legal position maintained by the Company.

Nor, we submit, is this surprising. Throughout the unfair labor practice proceedings, the Board consistently adhered to the position that its decision did *not* mean that the Company was required to agree to a checkoff provision in the resumed bargaining which it ordered. See footnote 9 of the Trial Examiner's decision quoted above at p. 2, which the Board affirmed. Significantly, this position was one of the main bases upon which the Union sought review in this Court. The Union's opening brief dated February 23, 1966, (pp. 16-17) emphasized that the above aspect of the Board's order was totally inconsistent with the remainder of its opinion which found the Company had refused the Union's demand for a dues checkoff provision "to frustrate agreement with the Union." Because of this fatal inconsistency the Union

urged that the Company could remedy its unfair labor practice only if it was ordered by the Board to withdraw its resistance to the Union's proposal.

The Court held (*id.* at 276) that "[w]hile it is clear from the record that the Company had no reason, other than to frustrate the bargaining procedure, to refuse to accept the dues checkoff, it is not necessary to include a specific reference to the check-off in the Board's order." Implicit in this statement was the Court's recognition that a subsequent refusal by the Company to agree to a dues checkoff provision would contravene the general bargaining order. This is not a matter of conjuncture; indeed, the Court made known its dissatisfaction with the Trial Examiner's reasoning — which the Board adopted — that in the resumed bargaining the Company was not required to agree to a dues checkoff. This reasoning was expressly rejected by the Court (*id.* at 276, n. 16), thusly, "To suggest that in further bargaining the Company may refuse a check-off for some other reason, not heretofore advanced, makes a mockery of the collective bargaining required by the statute."

Nevertheless, the Board apparently was not able to come to grips with the plain import of the Court's teachings. For even after the decision issued, the Board still has sought to pressure its position on the very point as to which this Court differed with the Board. Thus, the Board's brief in opposition to the Company's petition for certiorari in the Supreme Court stated (at p. 7) as follows:

> "The Board's order merely directs the Company to bargain with the Union . . . In other words, the

Company's past refusal to bargain may have been so egregious that it can now demonstrate its good faith only by making some concession to the Union's demands on this subject."[2]

It seems clear therefore that the Board's June 22nd determination to close this case is merely the last in a series of instances where it has consistently evinced its refusal to interpret the Court decree in accordance with its plain meaning. At this juncture, it is essential that this Court call a halt to this distressing state of events by issuing an order clarifying its earlier decree, so that the Board, once and for all times, will attached the proper legal interpretation to that decree. This the Union requests through the instant motion. Unless this motion is entertained, the Board will have succeeded in undermining the decision of this Court. Lest we be misunderstood — the Union is not urging or even suggesting that the Court usurp the Board's contempt function, but only that the Court enlighten the Board as to the meaning of its decree so that the Board can exercise its contempt function properly.

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2. The Board's restrictive interpretation of the Court decree is rendered even more incongruous in light of the Company's earlier concession that "the effect of the opinion and order of the Court is to require the Company to agree to a dues checkoff provision. This, the Company contends, would be most unfair . . ." See the Company's response (June 21, 1966) to the Union's opposition to the Company's request that this Court stay its decree pending the decision of the Supreme Court on whether to grant certiorari.

WHEREFORE, the Union prays that its motion to reconsider its motion to clarify the decree of the Court be entertained, and the Court clarify its decree as requested by the Union

ELLIOT BREDHOFF
MICHAEL H. GOTTESMAN
GEORGE M. COHEN
Attorneys for Movant
United Steelworkers of America, AFL-CIO.

(Dated July 21, 1967)

(Certificate of Service omitted in printing)

Exhibit A

April 3, 1967

MR. JOHN PENELLO, Director
Baltimore Regional Office
707 North Calvert St. — 6th Floor
Baltimore, Maryland 21202

RE: H. K. PORTER COMPANY

Dear Mr. Penello:

As you are already aware, on February 27, 1967 the United Steelworkers of America filed a motion in the Court of Appeals for the District of Columbia Circuit requesting clarification of the decree issued by the Court on May 19, 1966 (363 F. 2d 272). It was the Union's position that this decree required, *inter alia,* that H. K. Porter Company agree to a dues checkoff provision in its collective bargaining agreement with the Union. Further it was the Union's position that since the Company did not agree with this interpretation on the decree (see George Cohen's statement on file with the Region) it was appropriate for the Court to clarify its decree by advising the Company of its legal obligation thereunder.

On March 22, 1967, the Court of Appeals issued its order in the above captioned matter, as follows:

It appearing that the union's motion to clarify the decree of this court in these proceedings is based in part on facts arising subsequent to the effective date of the decree; and

It further appearing that there is in the record no concession from the company that the facts are as alleged by the union, and that under the circumstances a

contempt proceeding, rather than proceedings in connection with a motion to clarify the decree, would be more appropriate to test the company's compliance with the decree;

It is ORDERED that the motion for leave to file the motion to clarify the decree is granted.

It is FURTHER ORDERED that the motion to clarify the decree is denied.

In light of this order we are hereby requesting that the Region initiate a contempt action. We would greatly appreciate an expeditious resolution of this matter, and to this end we are prepared to assist you in any manner desired.

Thanking you for your cooperation, I remain

GEORGE COHEN

GH:jm

cc: DOMONICK MANOLI
WINN NEWMAN
BERNARD KLEIMAN
M. C. WESTON, JR.
WILBURN BOOTH

Exhibit B

NATIONAL LABOR RELATIONS BOARD

REGION 5
1019 Federal Building, Charles Center
Baltimore, Maryland 21201

Telephone 962-2822

June 22, 1967

MR. DONALD C. WINSON, ESQ.
ECKERT, SEAMANS & CHERIN
Porter Building, 10th Floor
Sixth Avenue & Grant Street
Pittsburgh, Pa. 15219

Re: H. K. PORTER COMPANY, INC.
Disston Division — Danville Works
Case No. 5-CA-2785

Dear Mr. Winson:

The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provision of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur.

Very truly yours,
JOHN A. PENELLO
Regional Director

CC: MR. DANIEL W. SIXBEY, Atty.
DIGGEN & O'BOYLE
1010 Vermont Avenue, N. W.
Washington, D. C. 20005
MICHAEL H. GOTTESMAN, Atty.
1001 Connecticut Avenue, N. W.
Washington, D. C.
JERRY D. ANKER, Atty.
1001 Connecticut Avenue, N. W.
Washington, D. C.

Opposition to Motion for Reconsideration

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT
UNITED STEELWORKERS OF AMERICA, AFL-CIO,

Petitioner,

No. 19,492

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

H. K. PORTER COMPANY, INC., DISSTON
DIVISION — DANVILLE WORKS,

Petitioner,

No. 19,507

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent.

Opposition of H. K. Porter Company, Inc. to Motions of United Steelworkers of America

H. K. Porter Company, Inc., the Petitioner in the above-captioned Case No. 19,507, hereby opposes the Motion filed by the United Steelworkers of America requesting this Court to reconsider the Union's prior Motion to Clarify the decree entered May 19, 1966. This Court denied the Union's prior Motion to Clarify on March 22, 1967. The Company also opposes the Union's Motion requesting oral argument.

In opposing the present Motions, the Company submits that the Union's request for clarification is a transparent attempt to seek rehearing of the Order dated May 19, 1966 in the hope that this Court will alter or amend that Order and grant the Union the relief it initially sought, but which this Court declined to grant. In addition the Company submits that the relief sought by the Union in its present Motions is contrary to and precluded by law. Furthermore, there is no need for clarification of this Court's Order, for it is clear and unambiguous in ordering the Company to bargain collectively with the Union upon request.

WHEREFORE, H. K. Porter Company, Inc. requests that the Union's Motions be denied.

Respectfully submitted,
s/ DANIEL W. SIXBEY
DANIEL W. SIXBEY
DIGGINS & O'BOYLE
1010 Vermont Avenue, N.W.
Washington, D. C. 20005
Attorneys for
H. K. Porter Company, Inc.

Of Counsel:
PAUL R. OBERT, Esq.
1500 Porter Building
Pittsburgh, Pennsylvania
DONALD C. WINSON, Esq.
WM. ALVAH STEWART, Esq.
ECKERT, SEAMANS & CHERIN
1000 Porter Building
Pittsburgh, Pennsylvania 15219

(Dated July 25, 1967)

(Certificate of Service omitted in printing)

December 8, 1967 Decision and Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 19,492

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

No. 19,507

H. K. PORTER COMPANY, INC., DISSTON DIVISION-DANVILLE WORKS, Petitioner

v.

NATIONAL LABOR RELATIONS BOARD, Respondent

UNITED STEELWORKERS OF AMERICA, AFL-CIO, Intervenor

MOTION FOR RECONSIDERATION OF DENIAL OF MOTION TO CLARIFY DECREE

Decided December 8, 1967

Messrs. Elliot Bredhoff, Michael H. Gottesman and George H. Cohen were on the motion for petitioner in No. 19,492 and intervenor in No. 19,507.

Messrs. Daniel W. Sixbey and *Bartholomew Diggins* were on the opposition for petitioner in No. 19,507.

Mr. Marcel Mallet-Prevost, Assistant General Counsel, National Labor Relations Board, filed an appearance on behalf of respondent.

Before BAZELON, *Chief Judge,* WILBUR W. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge,* in Chambers.

WRIGHT, *Circuit Judge*: In October 1961 the United Steelworkers of America was certified as the bargaining representative of the production and maintenance employees of the H. K. Porter Company's Danville, Virginia, plant. A year later the union initiated an unfair labor practice proceeding alleging that the company was not making the good faith effort to reach an agreement which Sections 8(a) (5) and 8(d) of the National Labor Relations Act require. In an unreported decision the Trial Examiner, whose decision was adopted by the Board, found that the company had indeed failed to bargain in good faith by, among other things, adamantly refusing to agree to an arbitration provision while insisting on a non-strike clause, unilaterally changing conditions of employment, and refusing to meet at reasonable times. The Examiner concluded that the company "was demanding in effect that the union relinquish the basic rights conferred by the Act or it would not receive a contract," and that the company's actions were designed to "subvert the union's position as the statutory representative." No exceptions were taken to these findings, and in July 1964 the Fourth Circuit enforced the order of the Board that the company bargain in good faith.

In the meantime the company had refused to negotiate at all, pending the Trial Examiner's decision and its approval by the Board. In October 1963 bargaining resumed, with 14 issues in dispute. By November 1964, 21 more meetings had taken place, but still no final agreement was reached. During this period 11 issues were resolved; the union conceded 10,

while the company, 10 months after the Trial Examiner's decision requiring it to do so, finally withdrew its demand for a no-strike clause. Thus, when this second round of negotiations broke down, three issues remained unresolved: checkoff, wages and insurance.

The union had pressed for a checkoff at almost every bargaining session, but the company repeatedly refused to collect the dues of voluntarily paying members because dues collection was the "union's business" which the company would not foster or promote. On several occasions the union offered to withdraw its demand for a checkoff if the company would permit union stewards to collect dues during non-working hours in non-working areas of the plant. But the company rejected this alternative as well.

Again the union initiated unfair labor practice charges, and again the Trial Examiner, whose decision was again adopted by the Board, found that the company had violated its duty to bargain in good faith on the checkoff issue. He concluded, from substantial evidence in the record, that the real and only reason for refusing the checkoff was to "frustrate agreement with the union." At the hearing the company's representative admitted that it made deductions from volunteering employees' wages for a variety of charitable causes and that there would be no inconvenience involved in checking off union dues; that, in fact, the company does check off union dues at certain of its other plants.

On May 19, 1966, this court affirmed the NLRB and granted the Board's cross-petition to enforce its order requiring the company to bargain in good faith. *United Steelworkers of America v. N.L.R.B., H. K. Porter Co.*

v. N.L.R.B., 124 U.S. App. D.C. 143, 363 F.2d 272, *cert. denied*, 385 U.S. 851 (1966). In our opinion we noted an inconsistency in the Board's order. In a footnote, the Trial Examiner had said, "This is not to say that in the resumed bargaining sessions which I shall recommend, Respondent will be required to agree to some form of check off. I only find and conclude that on that issue Respondent did not heretofore bargain in good faith, and that it should be required to do so. If after such good faith bargaining the parties reach an agreement or an impasse, the requirements of the Act will have been fulfilled."

This conclusion conflicted with the Examiner's finding, in the text, that the company's refusal to grant a checkoff was solely "for the purpose of frustrating agreement with the union * * *." In our opinion enforceing the Board's order, we indicated that to permit the company to refuse a checkoff for some concocted reason not heretofore advanced would make a mockery of the collective bargaining required by the statute. Since the text of the Trial Examiner's decision controls, we ruled that his Footnote 9 should be disregarded. We also invited the Board to initiate contempt proceedings if its order, as we interpreted it, was not complied with.

In the ensuing negotiations the company and the union each urged completely different interpretations of our decree. The company took the position that the decree was merely yet another order that it bargain in good faith — this time on the issue of dues collection. Accordingly, the company proposed to discuss the possibility of making available to the union a table

in the payroll office. The union, on the other hand, asserted not only that it was entitled to its statutory right to collect dues during non-working hours in non-working areas of the plant, but also that under our decision the company was obligated to agree to a contractual dues checkoff provision as well. In other words, the union interpreted the decree as entitling it to both channels of dues collection, while the company construed the decree as requiring it only to negotiate about giving the union some space to collect its own dues.

This disagreement apparently thwarted further bargaining, and on February 28, 1967, the union moved in this court for clarification of the decree. On March 22 we permitted filing of the motion and, on the same day, denied it. However, we again invited the Board to test the competing interpretations of the decree through it contempt process. On April 3 the union wrote to the Regional Director asking that he initiate contempt proceedings; on June 22 the Board responded by letter to this request as follows:

> "The Respondent having satisfactorily complied with the affirmative requirements of the Order in the above-entitled case, and the undersigned having determined that Respondent is also in compliance with the negative provisios of the Order, the case is hereby closed. Please note that the closing is conditioned upon continued observance of said Order and does not preclude further proceedings should subsequent violations occur."

Since the Board had apparently accepted the company's interpretation of the decree as requiring only that it now bargain with the union as to some form of dues

collection, on July 21, 1967, the union filed a motion in this court that we reconsider our earlier denial of its motion to clarify our decree. Permission to file is hereby granted, and to the extent of what follows, the motion to clarify is granted.

I

The Trial Examiner found that the company had no valid reason to refuse a checkoff provision and had done so solely to frustrate an agreement with the union. Though there was an inconsistency in his report, which report the Board adopted *in toto,* we resolved this contradiction by interpreting the Board's order as foreclosing the company from dreaming up new reasons for refusing a checkoff. By this we did not mean to say that the Board order required the company simply to agree to a checkoff provision. Though it would not be permitted to proffer new reasons for opposing such a clause, it was still free to seek something in return for granting it. Unless it did so, a presumption of continuing bad faith could not be dispelled.

We did not think that under the Board order the company could now purge itself of its bad faith and meet its Section 8(d) obligations by agreeing simply to negotiate on alternatives to a checkoff. Apparently we misread the Board's order, for the Board is apparently satisfied that the employer has complied with its duty to bargain in good faith by agreeing to such negotiations. Certainly the final responsibility for interpreting the Board's order must rest with the Board, for "the relation of remedy to policy is peculiarly a matter of administrative competence." *Phelps Dodge Corp. v. N.L.R.B.,* 313 U.S. 177, 194 (1941). And, in-

deed, it is only the Board that can initiate contempt proceedings even where its order has been enforced by a judicial decree. *Amalgamated Utility Workers v. Consolidated Edison Co.*, 309 U.S. 261 (1940). Since the bargaining impasse may continue, however, some guidance from the court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order. This case will be remanded to the Board, therefore, for reconsideration in the light of this opinion.

II

Section 8(a) (5) of the National Labor Relations Act makes it an unfair labor practice for an employer "to refuse to bargain collectively with the representatives of his employees * * *." The Labor-Management Relations Act extended the duty to bargain to unions, and, in Section 8(d), elucidated its meaning in some detail:

> "For the purposes of this section, to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement, or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party, but such obligation does not compel either party to agree to a proposal or require the making of a concession * * *."[1]

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1. 61 STAT. 142 (1947), 29 U.S.C. § 158(d) (1964).

The statute made explicit what the Board and the courts had already found by implication: that the duty to bargain collectively required the employer to make a good faith effort to reach an accord with the union.[2] So far, on two separate occasions the H. K. Porter Company has been found not to have made such an effort. The company maintains, however, that all the Board can do, despite this tainted record, is issue yet another order that the company mend its ways and begin to bargain in good faith. The company argues that the last clause of Section 8(d)—"but such obligation does not compel either party to agree to a proposal or require the making of a concession"—bars the Board from taking more drastic action.

We do not read Section 8(d) as prohibiting the Board from ordering a company, which has repeatedly flouted its Section 8(a) (5) duty, to make meaningful and reasonable counteroffers, or indeed even to make a concession where such counteroffers or such a concession would be the only way for the company to purge the stain of bad faith that has already soiled its position. In certain cases such action by the company may be the only means of assuring the Board, and the court, that it no longer harbors an illegal intent.

Section 8(d) defines collective bargaining and relates to the determination of *whether* a Section 8(b) (5) violation has occurred and not to the *scope* of the rem-

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2. *See, e.g., N.L.R.B. v. Montgomery Ward & Co.*, 9 Cir., 133 F.2d 676 (1943); *see generally* Smith, *The Evolution of the "Duty to Bargain" Concept in American Law*, 39 MICH. L. REV. 1065, 1089 (1941); Cox, *The Duty to Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958).

edy which may be necessary to cure violations which have already occurred. That is, Section 8(d) precludes the Board from concluding that an employer had violated its duty to bargain in good faith simply because he did not agree to a particular proposal or make a particular concession. Where, as here, the subject of the dispute is a mandatory subject of bargaining,[3] either party may bargain to an impasse provided such bargaining is in good faith, and so long as the employer's position is maintained in good faith, no conclusive inference can be drawn from this obstinacy alone.

But in this case the Trial Examiner found bad faith. Based on the concatenation of circumstances taken as a whole, he concluded that the company's sole purpose in refusing a checkoff was to frustrate agreement with a union that had the statutory right to bargain collectively as the chosen representative of the employees of the plant. This was an unfair labor practice, for the right to refuse a particular proposal or to make a concession may not be used "as a cloak * * * to conceal a purposeful stategy to make bargaining futile or fail." *N.L.R.B. v. Herman Sausage Co.*, 5 Cir., 275 F.2d 229, 232 (1960). Since the company had conceded that it had no business reason for refusing the checkoff, it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union on wages or insurance—the two issues besides checkoff that remained in dispute. Indeed, it is possible that in an appropriate case the Board could simply order the company to grant a checkoff.

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3. *N.L.R.B. v. Darlington Veneer Co.*, 4 Cir., 236 F.2d 85 (1956); *N.L.R.B. v. Reed & Prince Mfg. Co.*, 1 Cir., 205 F.2d 131, 136, *cert. denied*, 346 U.S. 887 (1953).

III

We recognize that the National Labor Relations Act is grounded on the premise of freedom of contract —albeit collective contract.[4] The substantive terms of the collective agreement are to be forged by the parties to it, not by the Board.[5] This ideal of freedom of contract is both a noble and a practical one,[6] and remedies which impinge on it are not to be casually undertaken. But an equally important policy of the Act is to equal-

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4. As the Chairman of the Senate Committee on Education and Labor, Senator Welsh, put it in 1935: "When the employees have chosen their organization, when they have selected their representatives, all the bill proposes to do is to escort them to the door of their employer and say, 'Here they are, the legal representatives of your employees.' What happens behind those doors is not inquired into, and the bill does not seek to inquire into it." 79 CONG. REC. 7660 (1935).

5. The Board may not "sit in judgment upon the substantive terms of collective bargaining agreements," for the Act does not "regulate the substantive terms governing wages, hours and working conditions which are incorporated in an agreement." *N.L.R.B. v. American National Ins. Co.*, 343 U.S. 395, 404, 402 (1952). Nor can the Board "regulate the choice of economic weapons that may be used as part of collective bargaining"; if it could, "it would be in a position to exercise considerable influence upon the substantive terms on which the parties contract. * * * Our labor policy is not presently erected on a foundation of government control of the results of negotiations." *N.L.R.B. v. Insurance Agents Union*, 361 U.S. 477, 490 (1960). *See generally* Wellington, *Freedom of Contract and the Collective Bargaining Agreement*, 112 U. PA.L. REV. 467, 469-477 (1964).

6. *See* Kessler, *Contracts of Adhesion - Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629-630 (1943).

ize the bargaining power of employees and employers by assuring and guaranteeing the right of workers to organize and bargain collectively through their elected representatives,[7] and the major purpose behind the Section 8(a) 5 duty to bargain is to make meaningful this fundamental right of employees.[8] As the Senate

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7. Congress stated the theory of the Act in its first section: "The inequality of bargaining power between employees * * * and employers * * * tends to aggravate recurrent business depressions, by depressing wage rates and the purchasing power of wage earners * * *." To restore equality of bargaining power it was declared to be a policy of the United States to encourage "the practice and procedure of collective bargaining." 49 STAT. 449 (1935), as amended, 29 U.S.C. § 151 (1964).

8. As the Supreme Court said in reviewing the legislative history of the Wagner Act: "It was believed that other rights guaranteed by the Act would not be meaningful if the employer was not under obligation to confer with the union in an effort to arrive at the terms of an agreement." *N.L.R.B. v Insurance Agents Union, supra* Note 5, 361 U.S. at 483. Professor Wellington has termed this the "supportive" function of the duty to bargain. "In the absence of a requirement of good faith negotiation, collective bargaining may never occur. * * * The statutory scheme of protecting organization from unfair practices and of allowing employee choice between union and no-union in such a situation would be frustrated." Wellington, *supra* Note 5.112 U. Pa. L. REV. at 470. As Professor Cox has put it: "The denial of recognition is an effective means of breaking up a struggling young union too weak for a successful strike. After the enthusiasm of organization and the high hopes of successful negotiations, it is a devastating psychological blow to have the employer shut the office door in the union's face. Imposing a legal duty to recognize the union would prevent such anti-union tactics and thereby contribute to the growth of strong labor organizations." Cox, *supra* Note 2. 71 HARV. L. REV. at 1408.

Committee report accompanying the National Labor Relations Act put it:

> "* * * It seems clear that a guarantee of the right of employees to bargain collectively through representatives of their own choosing is a mere delusion if it is not accompanied by the correlative duty on the part of the other party to recognize such representatives as have been designated * * * and to negotiate with them in a bona fide effort to arrive at a collective bargaining agreement. Furthermore, the procedure of holding governmentally supervised elections to determine the choice of representatives of employees becomes of little worth if after the election its results are for all practical purposes ignored. Experience has proved that neither obedience to the law nor respect for law is encouraged by holding forth a right unaccompanied by fulfillment. * * * S.Rep. No. 573, 74th Cong., 1st. Sess., p. 12 (1935).

To make sure that this primary right is fulfilled, the NLRB has been given broad remedial powers. Section 10 (c) of the Act charges the Board with the task "of devising remedies to effectuate the policies of the Act." *N.L.R.B. v. Seven-Up Bottling Co.*, 344 U.S. 344, 346 (1953) [9] Where, in a particular case, two policies of the Act conflict, the Board must seek to devise remedies which will best effectuate the one at least cost to the other. Though ordering an employer to grant a

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9. Section 10(c), 29 U.S.C. § 160(c), authorizes the Board "to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this subchapter."

checkoff obviously intrudes on freedom of contract, it may, in certain instances, be the only way to guarantee the workers' right to bargain collectively.

This court is cognizant of the fact that the Board's remedial measures have not proved adequate in coping with the recalcitrant employer determined to defeat the effective unionization of his plant by illegally opposing organizational and bargaining efforts every step of the way.[10] As Dr. Ross concluded in his landmark study of duty to bargain cases:

"7. The major shortcoming of the NLRB lies in its failure to adopt adequate and realistic remedies in those cases where the employer has unmistakably demonstrated a continuing intent to frustrate the Act." Ross, *Analysis of Administrative Process Under Taft-Hartley,* 63 LAB. REL. REP. 132, 133 (BNA 1966).[11]

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10. The H. K. Porter Company has also been found to have committed unfair labor practices in connection with union election campaigns. *H. K. Porter, Inc. and United Textile Workers of America,* 131 N.L.R.B. 1383 (1961).

11. A special subcommittee on labor of the House Committee on Education and Labor is now considering proposed legislation, H.R. 11725, 90th Cong., 1st Sess., designed to make the National Labor Relations Act remedies more effective. And the Board itself is engaged in a study of whether it should more rigorously exercise its existing remedial powers by awarding compensatory pay for delays caused by illegal refusals to bargain. The Trial Examiner in *Zinke's Foods, Inc.* NLRB Case No. 30-CA-372, proposed such a remedy, while another Examiner recommended against it in *Herman Wilson Lumber Co.,* NLRB Case No. 26-CA-2536. *See also Ex-Cell-O Corp.,* NLRB Case No. 25-CA-

When the unfair labor practices are committed in localities where hostility to the union movement may run deep, the determined employer who litigates charges often succeeds in ousting the union despite the Board's repeated findings of Section 8(a) (5) violations.[12] And the testimony of witnesses at the recently completed hearings of the House subcommittee on NLRB remedies shows that the refusal to bargain in good faith is frequently the last ditch effort of the employer to undermine the union whose organizational effort he had been unable to frustrate.[13]

The requirement that a checkoff be granted is at most a minor intrusion on freedom of contract. In a

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2377, and *Int. U., United Automobile, etc. Workers of America v. N.L.R.B.*, Nos. 20,137, 20,185 and 20,301 (*appeals pending*) where the Board, after denying such a remedy, has asked that the cases be remanded for reconsideration of this question. As the Board said in *H. W. Elson Bottling Co.*, 155 N.L.R.B. 714, 715 (1965): "The Board has a particular duty under Section 10(c) to tailor its remedies to the unfair labor practices which have occurred * * *." "This process requires constant reevaluation of the Board's remedial arsenal so that the 'enlightenment gained from experience' can be applied to the 'actualities of industrial relations.' " *Id.* at 715 n.5.

12. "The collective bargaining conequences of a remedied violation depended mainly upon the nature and extent of an employer's original resistance to bargaining and his persistence in delaying compliance. Litigated cases frequently differed from non-litigated cases in fundamental ways and employers who litigated charges often succeeded in ousting their unions." Ross, *supra*, 63 LAB. REL. REP. at 133.

13. Testimony before the Special Subcommittee on Labor of the House Committee on Education and Labor on H.R. 11725 (1967).

case such as this, the checkoff provision—a provision which is included in 92 per cent of all manufacturing industries labor contracts[14]—is likely to be of life or death import to the fledgling union, [15] while it is of no consequense whatever to the employer.[16] Yet if the Board can do no more than repeatedly order the company to bargain in good faith, the workers' rights to bargain collectively may be nullified. The Board is empowered to see that this does not happen. Where an employer has twice been found to have violated his duty to bargain in good faith, a checkoff in return for a reason-

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14. *See* BNA, COLLECTIVE BARGAINING NEGOTIATIONS AND CONTRACTS, p. 87:3 Most of the contracts not containing a checkoff provide for some alternative method of dues collection on company property. *Id.* at p. 87:901.

15. In the instant case, the nearest union office was in Roanoke, Virginia, 85 miles from the plant. The employees were scattered over a wide area. As we said in our original opinion, collection of dues without a checkoff would have presented the union with a substantial problem of communication and transportation.

16. "The check-off is of great consequence to the union, as it avoids the necessity of collecting dues each and every week. It is of small consequence to the employer, especially if the union agrees to bear the additional expenses." *Supplemental statement of Frank Thompson, Jr., Chairman, Special Subcommittee on Labor*, September 14, 1966, HEARING BEFORE THE SPECIAL SUBCOMMITTE ON EDUCATION AND LABOR, HOUSE OF REPRESENTATIVES, 89 Cong., 2d Sess., p. 77 (1966). In fact, the Subcommittee recommended that the simple refusal to agree to a checkoff paid for by the union should itself be recognized "as a criteria of bad faith bargaining" and "an indication of anti-union animus." *Ibid.* In the instant case the company admitted that it had no business reason for opposing the checkoff.

able concession by the union[17] may be the only effective remedy. Such a remedy "will not be disturbed 'unless it can be shown that the order is a patent attempt to achieve ends other than those which can fairly be said to effectuate the policies of the Act.' *Virginia Elec. & Power Co. v. Labor Board*, 319 U.S. 533, 540." *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203, 216 (1964).

Remanded

Senior Circuit Judge WILBUR K. MILLER dissents.

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17. The Board has not undertaken to oversee the reasonableness of the substantive terms of collective bargaining contracts. Nor has it found a breach of the duty to bargain by considering simply the reasonableness of the offers and counteroffers made by the parties. This is as it should be. But as Judge Magruder pointed out: "[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations." *N.L.R.B. v. Reed & Prince Mfg. Co., supra* Note 3, 205 F.2d at 134. The Board could make a comparable judgment in deciding whether *its remedial order that reasonable counter offers be made* has been complied with.

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 19,492
SEPTEMBER TERM, 1967

United Steelworkers of America, Petitioner,
v.
National Labor Relations Board, Respondent.

NO. 19,507

H. K. Porter Company, Inc., Petitioner,
v.
National Labor Relations Board, Respondent.

Before: BAZELON, Chief Judge, WILBUR K. MILLER, Senior Circuit Judge and WRIGHT, Circuit Judge in Chambers.

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
Filed Dec. 8, 1967
NATHAN J. PAULSON
Clerk

Order

On consideration of the motion of United Steelworkers of America, AFL-CIO, for leave to file its lodged motion for reconsideration, it is

ORDERED by the Court that the Clerk is directed to file the lodged motion for reconsideration, the opposition thereto, and the motion requesting oral argument, and on consideration whereof, it is

FURTHER ORDERED by the Court that to the extent of the Court's opinion issued this date the motion to clarify is granted, and this case is remanded to the Board for reconsideration in light of the opinion.

Per Curiam.

Senior Circuit Judge Wilbur K. Miller dissents.

Supplemental Decision and Order of NLRB

172 NLRB No. 72 D-983

Danville, Va.

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

H. K. PORTER COMPANY, INC.
DISSTON DIVISION-DANVILLE WORKS
and
UNITED STEELWORKERS OF AMERICA, AFL-CIO
Case 5-CA-2785

Supplemental Decision and Order of NLRB.

On July 9, 1965, the National Labor Relations Board issued its Decision and Order in this case[1] finding that the Respondent had violated Section 8(a)(5) of the National Labor Relations Act, as amended, by failing to bargain in good faith with the Union on the issue of a checkoff provision in the collective-bargaining agreement with the Union. The Board thereupon ordered the Respondent to bargain collectively. On May 19, 1966, the United States Court of Appeals for the District of Columbia enforced the Board's Order.[2] Pursuant to a motion by the Union, the Court, on December 8, 1967, issued a decision clarifying its earlier decree and remanding the proceeding to the Board.[3]

The Board in the original decision herein concluded that the real and only reason for refusing the checkoff was to "frustrate agreement with the union" and ordered the Respondent to bargain with the Union. In enforcing that order the Court stated that it was "not necessary to include a specific reference to checkoff in the Board's order."[4] The Court also indicated that in any contempt proceeding instituted in the case it would be able to make a judgment based on the Respondent's performance at the bargaining table.

In subsequent contract negotiations the parties each urged divergent interpretations of the Court's decree. Briefly stated, the Union interpreted the decree as obligating the Company to agree to a contractual

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1. 153 NLRB 1370.

2. *United Steelworkers of America v. N.L.R.B.; H. K. Porter Co. v. N.L.R.B.*, 363 F.2d 272 (C. A. D.C.), cert. denied 385 U.S. 851.

3. 389 F. 2d 295 (C. A. D.C.).

4. 363 F. 2d 272 at 276.

dues-checkoff provision, while the Company construed the decree as requiring it only to discuss the possibility of giving a checkoff or some form thereof and therefore its offer to give the Union space in the payroll office to collect its dues fulfilled its obligation. Thereafter, the Regional Director for Region 5 indicated to the Union that the Respondent had satisfactorily complied with the decree and the Board declined to institute contempt proceedings.

In its decision granting the Union's motion to reconsider an earlier denial of a motion to clarify its enforcement decree, the Court noted the parties' divergent interpretations of the Order, and the subsequent bargaining impasse which had arisen therefrom. It believed, therefore, that "some guidance from the Court with respect to the circumstances under which checkoff may be imposed as a remedy for bad faith bargaining is in order."[5]

The Court noted that on two separate occasions the Respondent had been found to have violated Section 8(a)(5) by not making a good-faith effort to reach agreement with the Union.[6] The Court indicated that "the workers' rights to bargain collectively may be nullified" when a company repeatedly flouts its bargaining obligation, if the Board does no more "than repeatedly order the company to bargain in good faith." The Court thereupon held that in such circumstances the Board may order the company to make "meaningful and reasonable counteroffers, or indeed even to make a con-

5. 289 F.2d 295 at 298.

6. The instant case and an earlier unreported Trial Examiner's Decision in Case 5-CA-2344.

cession." Pointing out that the Respondent had conceded that it had no business reason for refusing to grant a checkoff, the Court stated that "it would have been perfectly proper for the Board to order the company to grant one in return for a reasonable concession by the union" on one of the remaining issues. And "it is possible," added the Court, "that in an appropriate case the Board could simply order the company to grant a checkoff . . . ."

The Court recognized that the Act is grounded on the premise of freedom of contract. However, it also pointed out that Section 8(a) (5) intends to make meaningful the fundamental duty of the employer to bargain with the representative of the employees. When these two concepts are in conflict, the Court further stated, "the Board must seek to devise remedies which will best effectuate the one at least cost to the other."

As respondent has repeatedly violated Section 8(a) (5) and admittedly had no business reason for opposing the checkoff, and as its only reason for such opposition was to frustrate agreement with the Union, we conclude in accordance with the Court's rationale, that an order to grant checkoff is warranted in the circumstances of this case. To permit Respondent to hold out for some "reasonable concession" by the Union in return for the checkoff requirement would imply that the Respondent is now being ordered to surrender a position that it had legitimately maintained. Such an implication would be contrary to our finding, affirmed by the Court of Appeals, that Respondent's opposition to granting checkoff was based solely on a desire to thwart the consumation of a collective-bargaining argeement.

Accordingly, we shall vacate our initial order in this case and shall direct that Respondent grant a checkoff provision to the Union.

Supplemental Order

Pursuant to Section 10(c) of the National Labor Relations Act, as amended, the National Labor Relations Board hereby orders the H. K. Porter Company, Inc., Disston Division-Danville Works, Danville, Virginia, its officers, agents, successors, and assigns, shall:

1. Cease and desist from:

(a) Refusing to bargain collectively with United Steelworkers of America, AFL-CIO, as the exclusive collective-bargaining representative of its employees in a unit composed of all production and maintenance employees at its Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors as defined in said Act, with respect to rates of pay, wages, hours of employment, and other terms and conditions of employment.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of their right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purposes of collective bargaining or other mutual aid or protection, or to refrain from any and all such activities.

2. Take the following affirmative action found necessary to effectuate the policies of said Act:

(a) Upon request bargain collectively with United Steelworkers of America, AFL-CIO, as the ex-

clusive representative of the employees in the aforesaid unit, and embody any understanding reached into a signed contract.

(b) Grant to the Union a contract clause providing for the checkoff of union dues.

(c) Post at its plant in Danville, Virginia, copies of the notice attached marked "Appendix."[7] Copies of said notice, on forms provided by the Regional Director for Region 5, shall, after being signed by an authorized representative of Respondent, be posted by Respondent immediately upon receipt thereof, and maintained by it for a period of 60 consecutive days from the date of posting, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(d) Notify said Regional Director, in writing, within 10 days from the date of this Order, what steps Respondent has taken to comply herewith.

Dated, Washington, D. C. July 3, 1968.

FRANK W. MCCULLOCH, Chairman
JOHN H. FANNING, Member
GERALD A. BROWN, Member
SAM ZAGORIA, Member
[SEAL] NATIONAL LABOR RELATIONS BOARD

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7. In the event that this Order is enforced by a decree of a United States Court of Appeals, there shall be subtituted for the words "a Decision and Order" the word "a Decree of the United States Court of Appeals, Enforcing an Order."

APPENDIX
NOTICE TO ALL EMPLOYEES PURSUANT TO A DECISION AND ORDER

of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby give notice that:

WE WILL, upon request, bargain collectively with UNITED STEELWORKERS OF AMERICA, AFL-CIO, as the exclusive representative of our employees in a unit composed of all production and maintenance employees at our Danville, Virginia, plant, excluding office clerical employees, professional employees, guards, and supervisors, as defined in the National Labor Relations Act, with respect to rates of pay and other terms and conditions of employment, and if an understanding is reached, embody the same into a signed agreement.

WE WILL grant to the Union a contract clause providing for the checkoff of union dues.

WE WILL NOT by refusing to bargain collectively with the duly designated representative of our employees, or in any like or related manner, interfere with, restrain, or coerce our employees, in the exercise of their right to self-organization, to form, join, or assist the above-named, or any other labor organization of our employees, to bargain collectively through representatives of their own choosing, or to engage in other concerted activities for the purposes of mutual aid, or to refrain from any or all such activities.

All our employees are free to become, remain, or refrain from becoming or remaining members of the above named or any other labor organization.

H. K. PORTER COMPANY, INC.
(Employer)

By .....
(Representative) (Title)

Dated.....

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

Employees may communicate directly with the Board's Regional Office, Room 1019, Federal Building, Charles Center, Baltimore, Maryland 21201 (Tel. No. 962-2822), if they have any question concerning this notice or compliance with its provision.

April 22, 1969 Order of Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

NO. 22,222

SEPTEMBER TERM, 1968

H. K. Porter Company, Inc.,
Disston Division—Danville Works, Petitioner
v.
National Labor Relations Board, Respondent
United Steelworkers of America, AFL-CIO,
Intervenor

UNITED STATES COURT OF APPEALS
for the District of Columbia Circuit
Filed April 22, 1969

NATHAN J. PAULSON
Clerk

Petition to review and set aside and cross-petition to enforce an order of the National Labor Relations Board.

Before: BAZELON, *Chief Judge,* WILBUR K. MILLER, *Senior Circuit Judge,* and WRIGHT, *Circuit Judge.*

Order

This case came on to be heard on the record from the National Labor Relations Board and on a petition to review and set aside and a cross-petition to enforce an order of the National Labor Relations Board, and was argued by counsel.

This case has been before this court on two prior occasions. *See United Steelworkers of America, AFL-CIO v. N.L.R.B.*, 124 U.S.App.D.C. 143, 363 F. 2d 272, *cert. denied,* 385 U.S. 851 (1966); *United Steelworkers of America, AFL-CIO v N.L.R.B.,* 128 U.S. App. D.C. 344, 389 F. 2d 295 (1967). For the reasons stated in those opinions, as well as in the Board's supplemental decision and order dated July 3, 1968, which is attached as an appendix to this order, it is

ORDERED by the court that the petition for review of the supplemental decision and order of the Board dated July 3, 1968, be, and the same is hereby, denied, and the Board's order is hereby enforced.

Per Curiam.

Senior Circuit Judge WILBUR K. MILLER dissents.

October 13, 1969 Order of Supreme Court of United States

SUPREME COURT OF THE UNITED STATES
No. 230, October Term, 1969
H. K. PORTER COMPANY, INC., *etc.*,
Petitioner
v.
NATIONAL LABOR RELATIONS BOARD, ET AL.

ORDER ALLOWING CERTIORARI. Filed October 13, 1969.

The petition herein for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit is granted, and the case is placed on the summary calendar.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Marshall took no part in the consideration or decision of this petition.